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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22418

NORTHWEST VIDEO, INC.
FLATHEAD LAKE CABLE TV, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents,

KMOS-TV, INC.,

Intervenor.

3479

v. 3479

FILED

MAY 20 1968

WM. B. LUCK, CLERK

On Petition for Review of Orders of the
Federal Communications Commission

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Lake Cable TV, Inc.

Date: May 17, 1968

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REPLY BRIEF FOR PETITIONERS

I. INTRODUCTION

H & B Communications Corporation (hereinafter referred to as "H & B"), the successor in interest to the original Petitioners in this proceeding, ^{1/}believes that for the most part the issues have been fully

^{1/} Simultaneously with the filing of this Reply Brief, H & B Communications Corporation is filing a Motion for Substitution as a Party for the original Petitioners. Since the Court has not had an opportunity to act on that Motion, the caption setting forth the original Petitioners has been retained on this Reply Brief.

joined in the Briefs thus far filed and that no further argument is necessary in support of the points raised by the original Petitioners in their Brief. However, two additional matters raised by the Respondents require brief comment. First, the Respondents, at pp. 11 and 12 of their Brief, have argued that the original Petitioners were precluded, because they did not raise the issues below, from arguing that the Federal Communications Commission (hereinafter referred to as "the Commission") lacks jurisdiction over CATV, that the non-duplication rule restrains free speech, and that the non-duplication rule is a restraint of trade. Second, at page 12 of their Brief, Respondents argue that because the papers filed by the original Petitioners before the Commission make no reference to the need for a hearing, either as a matter of law or because of the particular facts of these cases, the issue of whether a hearing was required is not properly before this Court and may not be considered. Each of these arguments will be discussed in turn.

II ARGUMENT

A. The Petitioners Are Not Precluded From Challenging The Commission's Statutory and Constitutional Authority.

Respondents rely primarily on Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405 for their argument that Petitioners are precluded from arguing that the Commission lacks jurisdiction over CATV that the non-duplication rule restrains free speech and that the non-duplication rule is a restraint of trade. In relevant part, Section 405 provides as follow

"The filing of a petition for rehearing shall not be a condition precedent to judicial review. . . except where the party seeking such review. . . relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."

The fact of the matter is that the Commission has had ample opportunity and has in fact passed on the questions raised by the original Petitioners numerous times. Long before Petitioners sought waiver of the non-duplication rule, the Commission asserted the authority to regulate CATV systems receiving service by microwave. See, e.g. Carter Mountain Transmission Corporation, 32 FCC 459 (1962); First Report and Order in Docket Nos. 14895 and 15233, 38 FCC 683 (1965). A Petition for Review of this proceeding was filed in the United States Court of Appeals for the Eighth Circuit, Black Hills Video Corporation et al. v. United States et al., Case No. 18052 (8th Cir.). Subsequently, and still prior to the time Petitioners first sought waiver of the non-duplication rule, the Commission asserted jurisdiction over all CATV, whether served by microwave or not. Second Report and Order in Docket Nos. 14895, 15233 and 15971, 2 FCC 2d 725 (1966). Attached to the Second Report and Order as Appendix C was the Commission's Memorandum on Its Jurisdiction and Authority. Within 30 days from the release of the full text of the Second Report and Order numerous CATV operators sought reconsideration from the Commission and specifically challenged the Commission's authority to regulate CATV on statutory and constitutional grounds. By Memorandum Opinion and Order

reconsideration, specifically affirmed its interpretation of its statutory authority, and rejected constitutional arguments. Thereafter, Petitions for Review of the Commission Orders asserting jurisdiction over CATV were filed in four different circuits of the United States Court of Appeals, including this Court. Midwest Video Corporation et al. v. United States, et al., Case No. 18348 (8th Cir.); Alice Cable Television Corporation v. Federal Communications Commission et al., Case No. 24434 (5th Cir.); Buckeye Cablevision, Inc. v. Federal Communications Commission et al., Case No. 17766 (6th Cir.); Mission Cable TV, Inc. et al. v. Federal Communications Commission et al., Case No. 21661 (9th Cir.). The cases from the Fifth, Sixth and Ninth Circuits were transferred to the Eighth Circuit, assigned new case numbers and consolidated with both Black Hills Video Corporation et al. v. United States et al., supra. and Midwest Video Corporation et al. v. United States et al., supra., then pending in the Eighth Circuit. Briefs were filed and oral argument held in the consolidated proceeding. In those proceedings the Commission defended its statutory and constitutional authority to regulate CATV on essentially the same grounds set forth in Appendix C to the Second Report and Order and the opinion denying reconsideration of the Second Report and Order. Moreover, during the pendency of the appeals in the Eighth Circuit, this Court decided Southwestern Cable Co. et al. v. United States et al. 378 F 2d 118 (9th Cir. 1967). cert. granted 389 U.S. 911 (1967). The Commission petitioned the Supreme Court for certiorari in the Southwestern Cable Co. case and

certiorari was granted on October 23, 1967, 389 U.S. 911 (1967). Since that time, briefs on the merits have been filed and oral argument held in the Supreme Court, and again the Commission defended its constitutional and statutory authority to regulate CATV on essentially the same grounds set forth in Appendix C to the Second Report and Order and its opinion denying reconsideration of the Second Report and Order. In the meantime, in all instances before the Commission where issues relating to the Commission's statutory or constitutional authority over CATV are raised, the Commission dismisses these issues, usually in less than one sentence, by referring to the Second Report and Order. See e.g., Minnesota CATV, Inc., 7 FCC 2d 943 (1967); Texas Community Antennas, Inc., 10 FCC 2d 203 (1967).

The Commission has therefore passed on the questions of law raised by the Petitioners and demonstrated that any further challenge before the Commission to its statutory or constitutional authority would be futile. This Court has recognized that futile challenges to agency authority before the agency are not a prerequisite to judicial review. Koepke v. Fontecchio, 177 F 2d 125 (9th Cir. 1949), and the Supreme Court has permitted persons to challenge the validity of agency regulations even though they did not participate in the agency proceeding leading to the adoption of the regulations and presumably the agency had no opportunity to pass on the specific challenge made. Frozen Food Express v. United States et al. 351 U.S. 40 (1956). The cases cited by the Respondents are not to the contrary. None involved situations where the statutory or constitutional authority of the

agency was in question. Indeed, one of those cases, United States v. Tucker Truck Lines, 344 U.S. 33 (1952), supports the Petitioners. That case involved a challenge to the authority of the Interstate Commerce Commission to enter the order in question because the hearing examiner had not been appointed pursuant to Section 11 of the Administrative Procedure Act. In rejecting the challenge, the Court noted that the claimed defect was not one which deprived the Interstate Commerce Commission of power or jurisdiction. At least by implication, however, the Court indicated that objections going to an agency's power or jurisdiction, such as those to which the Respondents are here referring, need not first be raised before the agency.

B. Petitioners Are Not Precluded from Asserting That A Hearing Was Required On Their Petitions.

With respect to Respondents' argument that the original Petitioners papers make no reference to the need for a hearing, such a request was not necessary. In Southwestern Cable Co. et al. v. United States et al., *supra*, this Court held as a minimum matter that the Commission could not issue an Order that was prohibitory in nature without at least complying with the procedural safeguards of Section 312 of the Communications Act for the issuance of Cease and Desist Orders. Section 312 (c) requires that the Commission provide an opportunity for a hearing before issuing a Cease and Desist Order. In view of this decision and the fact that the Commission's Order prohibits the continuation of the long established manner of operation

of the Kalispell and Polson CATV systems, a formal request for a hearing was not necessary.

Even if the procedural safeguards of Section 312 were not applicable, a formal request for a hearing was not necessary. In discussing the waiver procedure set forth in Section 74.1109 of the Rules, the Commission said (Second Report and Order, 2 FCC 2d at p. 764):

"... we have undertaken in §74.1109 of the attached rules to devise flexible and fair procedures which will generally permit expeditious processing of [waiver] requests. The procedures require a written petition with notice to interested persons and afford an opportunity for submission of comments or opposition to any request and for reply. Upon good cause shown, the Commission may shorten the times specified in the rules for the filing of opposition or reply comments. The petition and all other pleadings filed by the petitioner or interested persons must contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon. In the case of complaints or disputes, the steps taken by the parties to resolve their problem must also be set forth. The Commission will, where possible, promptly dispose of the matter on the basis of such written submissions. However, additional procedures such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, may be specified by the Commission if they appear necessary or appropriate after consideration of the pleadings [footnote omitted] (emphasis supplied)."

The Commission therefore stated that hearings would be held when necessary or appropriate, and it did not state that a specific request for a hearing was required. The language quoted above is incorporated in substance into Section 74.1109 (f) of the Rules and similarly does not require that a formal

2/
request for a hearing be made. H & B believes that the facts set forth in the original Petitioners' Brief demonstrates that in the circumstance of this case, a hearing was both necessary and appropriate before the waiver requests could be denied.

For the foregoing reasons and the reasons set forth by the original Petitioners' Brief, H & B urges that this Court grant the relief requested by the original Petitioners.

Respectfully submitted,

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Date: May 17, 1968

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2/ Section 74.1109(f) provides in relevant part as follows: "The Commission after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or issue. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects as it deems appropriate."

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

George H. Shapiro

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BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

This is a joint petition for review of the Memorandum Opinion and Order of the Federal Communications Commission (Commission), in Western Microwave, Inc., et al., 10 F.C.C. 2d 656, released November 17, 1967, (R. pp. 158-182), ordering petitioners to comply with Section 74.1103(e) of the Commission's Rules and

Regulations, 47 C.F.R. 74.1103(e). This petition for review is filed pursuant to the provisions of Section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C. §402(a) (1962); and Sections 2 and 3 of the Judicial Review Act, 64 Stat. 1129, 1130 (1950), 28 U.S.C. 2342 and 2343.

Petitioners are commonly owned corporations located and existing under and by the laws of the State of Montana and have their offices and principal places of business at Kalispell and Polson, Montana, respectively. Venue of this proceeding rests in this Judicial Circuit under Section 3 of the Judicial Review Act, 64 Stat. 1130 (1950), 28 U.S.C. 2343, and was docketed in this Court on December 7, 1967, under Case No. 22418.

STATEMENT OF THE CASE

Petitioners, Northwest Video, Inc. and Flathead Lake Cable TV, Inc. operate five-channel community antenna television (CATV) systems^{1/} in Kalispell and Polson, Montana, respectively. Petitioner Northwest Video's Kalispell CATV system also provides service to the nearby communities or subdivisions of Columbia Falls, Evergreen, Green Acres,

^{1/} "CATV is a way of delivering good television reception to areas greatly removed from the originating station. The concept includes the building of a large antenna in an area where reception is good. The antenna picks up the signal of one or more stations and transmits it or them, either by wire or microwave, to the area of poor reception. In the poor reception area, the signal is distributed to individual television receivers by wire, each receiver paying installation and monthly service fees." Southwestern Cable Co. v. United States, 378 F.2d 118, 119 (9th Cir., 1967), cert. granted 389 U.S. 911 (1967). Today, approximately 1,817 CATV systems serve approximately 3,167,000 households in the United States.

Day's Acres, Parkdale, Sunnyside, Zimwald Track, Phillips Addition and Half Moon. These communities are located approximately 90 air miles north of Missoula, Montana, wherein television station KGVO-TV is located. The Kalispell CATV system commenced service in May, 1953, and presently provides CATV service to over 4,000 subscribers supplying them with the following television signals which are received via common carrier microwave: (R. p. 2)

KXLY-TV	(CBS)	Spokane, Washington
KREM-TV	(ABC)	Spokane, Washington
KHQ-TV	(NBC)	Spokane, Washington
CJLH-TV		Lethbridge, Alberta, Canada

In addition, the Kalispell CATV system carries the signal of KGVO-TV (ABC/CBS/NBC), Missoula, Montana, as rebroadcast by station KØ9HA, a television translator station located 21 miles from Kalispell. (R. p. 2)

Petitioner Flathead Lake Cable TV, Inc. owns and operates a small CATV system located in Polson, Montana, a community of 2,314 residents located approximately 55 air miles north of Missoula. The Polson CATV system has been operating since November, 1966, and serves approximately 240 subscribers. The Polson CATV system carries the identical signals distributed by the Kalispell CATV system with the exception that the signals of KGVO-TV are received at Polson through a small one-watt translator facility. (R. pp. 113-114)

1. Regulation of CATV Systems by the FCC

Before proceeding with the impact of CATV regulations on petitioner's CATV systems, it is appropriate to assist this Court by describing briefly the history and pertinent rules of CATV regulation by the Federal Communications Commission.

The Federal Communications Commission asserted jurisdiction over CATV systems in the Second Report and Order in Docket Nos. 14895, 15233 and 15971, et al., released March 8, 1966, 2 F.C.C. 2d 725 (1966). Concerned with the alleged effects of program duplication, the Commission adopted Section 74.1103 of the Rules which established certain procedures pursuant to which a CATV system would be required to protect the program exclusivity of television stations. Section 74.1103 generally provides that a CATV system will be required, upon request and within the limits of its channel capacity, to carry without material degradation the signals of all television stations within whose Grade B service area the CATV system is located, in order of priority of signal grade.^{2/} In addition, it provides that a CATV system will be required

^{2/} The Commission classifies television service areas into three grades of service which are city-grade, Grade A and Grade B.

"Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90% of the time at the best 70% of receiver locations at the outer limits of this service. In the case of Grade B service, the figures are 90% of the time and 50% of the locations." Sixth Report and Order, 1 Pike & Fischer, R.R. 91:601 at 360 (1952). Cf., Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, 215-216 n. 12, 225 F.2d 511, 515-516 n. 12 (1955).

Under Section 74.1103(a), television stations are assigned the following four priorities in terms of signal strength: (1) principal community (city grade); (2) Grade A; (3) Grade B; and (4) translator stations.

upon request to avoid duplication of the programming of local television stations carried on the system during the same day that such programs are broadcast by the local station. This rule thus applies to programs broadcast from stations in different time zones. A local television station is only entitled to non-duplication protection on a CATV system against lower priority or more distant duplicating signals, but not against signals of equal priority (Section 74.1103(e)). Additionally, each CATV system need not delete reception of a network program if, in doing so, it would leave available for reception by subscribers, at any time, less than the programs of two networks, or would deprive them of color reception of the program (Section 74.1103(g)).

Provision was also made in the Rules whereby a waiver of the program exclusivity requirements could be requested under Section 74.1109, 47 C.F.R. 74.1109. This Section provides that the Commission may grant a waiver in whole or in part if it determines that the "public interest" would be served thereby. It also provides that the Commission may specify other procedures such as "oral argument" or "evidentiary hearing", if it deems such procedures appropriate considering the waiver request (Section 74.1109(f)). The specific provision in controversy with respect to petitioners here is Section 74.1103(e) of the Commission's Rules which, in essence, provides that when a CATV system operates within certain contours of the television station or if a 100-watt translator is assigned to its community, it must carry the signal of that station on its CATV system and must maintain program exclusivity for that station, if so requested.

2. Impact of the CATV Regulations on Petitioners' CATV Business

By letter dated May 12, 1966, KMSO-TV, Inc., licensee of television station KGVO-TV, Missoula, Montana, and of translator station KØ9HA, located 21 miles from Kalispell, requested Northwest Video, Inc. to provide non-duplication protection to KØ9HA in accordance with Section 74.1103 of the Rules. The programs rebroadcast by KØ9HA are those programs broadcast by KGVO-TV which does not cover the Kalispell CATV system with a predicted Grade B signal. As a translator station, KØ9HA operates with 100 watts power and is thus classified as a Fourth Priority station under Section 74.1103(a)(4) of the Commission's Rules.

On June 17, 1966, petitioner Northwest Video, Inc. filed a "Petition for Waiver" of the program exclusivity requirements of Sections 21.712 and 74.1103 with respect to the signal of KØ9HA, which, as indicated, rebroadcast the signals of KGVO-TV. KMSO-TV, Inc. opposed the waiver request of petitioner Northwest Video, Inc. and petitioner replied thereto.

In a Memorandum Opinion and Order released November 17, 1967, 10 F.C.C. 2d 656 (1967), the Commission denied without hearing the Petition for Waiver of petitioner Northwest Video, Inc. and directed compliance with the Rules within 30 days thereafter or by December 17, 1967. (R. pp. 168-171, 175)

By letter dated March 30, 1967, KMSO-TV, Inc., licensee of KGVO-TV, requested non-duplication protection with respect to the programming of KGVO-TV carried on the Polson CATV system. In response

thereto, petitioner Flathead Lake Cable TV, Inc. filed with the Commission on April 17, 1967, a petition for waiver of the program exclusivity requirements of Sections 21.712 and 74.1103 with respect to the signal of KGVO-TV. This waiver request was also denied without hearing by the Commission in its Memorandum Opinion and Order, released November 17, 1967. (R. pp. 172-175)

As a result of the Orders issued by the Commission, the effect on petitioner's CATV operations in Kalispell and Polson will be direct and substantial. The Kalispell CATV system, which has been in operation for over 14 years, commenced service prior to the operation of KGVO-TV. Protection of over 75% of the programming of the three major networks as broadcast by KGVO-TV on either of the five-channel CATV systems serving Kalispell and Polson will result in deletion of a large part of the applicable Spokane stations' programming on the system during the time when KGVO-TV programming is being duplicated. (R. pp. 98, 103-104; Taylor Affidavit to Motion for Stay, pp. 7-8) Subscribers who are accustomed to viewing Spokane network programming on Pacific time will now be forced to view on Mountain time those shows deleted by KGVO-TV programming which is fed from Salt Lake City. In addition to wholesale deletion of Spokane programming, subscriber viewing times will be drastically changed.

Because of the unusual and complex method by which KGVO-TV obtains a major part of its programming, subscribers will be forced to view an inferior signal from KØ9HA in Kalispell and from KGVO-TV in Polson in lieu of the high-quality signals received via microwave from Spokane. (R. pp. 2-7, 61-76) Petitioners' investments in Kali-

spell and Polson will be substantially impaired to the extent that subscribers may actually lose the television viewing which they have had for some time.

Petitioner Northwest Video has expended a substantial sum of money to improve picture quality from the Spokane stations and has introduced sophisticated technical equipment to improve reception. Elimination of the programming of Spokane stations when non-duplication protection would be required to be provided for the programming of KGVO-TV would delete a major feature of petitioners' services in Kalispell and in Polson. Immediate and substantial subscriber cancellation would result which would seriously threaten petitioners' investments in each system. Petitioners' subscriber loss in revenue in each instance would be heavy enough to cause severe economic loss to the Kalispell CATV system and, since Polson is an extremely small system operating at a loss, could destroy the operation. (Taylor Affidavit to Motion for Stay, pp. 9-10)

In addition, compliance with the non-duplication requirements will necessitate the installation of expensive automatic "switching" equipment to accomplish program deletion. (Taylor Affidavit to Motion for Stay, pp. 9-11) The hiring of additional skilled operating personnel will be required, which will permanently increase the system's cost of operation, all of this apart from the deprivation of the right of petitioners' subscribers to select the television stations which they desire to view.

It is clear that petitioners' present and future business operations will be severely restricted and disrupted if the Commission's Orders are allowed to stand. Failure to conform to the Commission's Regulations would entail serious legal consequences to petitioners under the Enforcement and Sanction provisions of the Communications Act.^{3/} Being thus adversely affected and aggrieved thereby, petitioners timely filed in this Court its petition for review alleging inter alia (a) that the Commission's action asserting jurisdiction over the CATV industry constituted an unlawful effort to regulate a non-jurisdictional activity and extended the agency's jurisdiction beyond its statutory authority; (b) that certain of the Commission's regulations constitute unconstitutional invasions and restrictions on the right of CATV subscribers to watch and listen to television programs as protected by the First Amendment to the Constitution; (c) that the effect of the CATV regulations constituted an unlawful taking of property without compensation in violation of the Due Process clause of the Fifth Amendment to the United States Constitution; and (d) that the Commission's action without first conducting a full evidentiary hearing constituted a denial of due process in violation of the Administrative Procedure Act and the Constitution of the United States. The petition prayed that the Commission's Order be set aside as unlawful insofar as it denied the petitions for waiver of Northwest

^{3/} See, e.g., 47 U.S.C. §§501, 502, which provide for imprisonment and/or monetary fine for violations of the Communications Act and "any rule, regulations, restriction or condition made or imposed by the Commission under authority" thereof.

Video, Inc. and Flathead Lake Cable TV Co., Inc. and that this Court afford such interim or pendente lite relief as this Court deemed necessary. On December 14, 1967, petitioners filed a Motion for Stay in this Court. Oral argument was heard thereon and on January 10, 1968, this Court granted a stay of the Memorandum Opinion and Order of the Commission in Western Microwave, Inc., et al., pending disposition of the petitions for review in this case and in Case No. 22393. The entire record of this petition for review is contained in the pleadings and orders of the Commission. Since no hearing was afforded petitioners, no evidence was taken.

ARGUMENT

Petitioners' specification of errors and legal argument are identical to those of petitioner Great Falls Community TV Cable Co., Inc. in Case No. 22393 in this Court. In that case, Great Falls Community TV Cable Co., Inc. filed a petition for review of the same order of the Commission of which petitioners here seek review. With the exception of certain factual circumstances, the issues raised in this petition and in Case No. 22393 are identical to those issues raised by petitioners. Petitioners herein therefore agree with the views and arguments of the petitioner Great Falls Community TV Cable Co., Inc. in Case No. 22393 with respect to the questions raised on the merits of this proceeding and adopt those views and arguments as their own. With respect to petitioners' unique factual situation, petitioners submit for this Court's consideration the following additional argument.

I. The Commission's Failure to Hold
a Hearing Violates the Basic
Tenents of Due Process

It is now clear from the operation of the CATV Rules that the Commission's regulatory control over CATV is more stringent and restrictive than its exercise of its licensing authority over other communication media. The safeguards of a full evidentiary hearing which are afforded to Commission licensees when their operations are modified are denied to a CATV system when the Commission proscriptively modifies an existing CATV business. In this procedural environment, the strictures of unreasonable and arbitrary administrative action unnecessarily choke or threaten the development of this method of communication contrary to the public interest. This procedural effect will never be more clearly apparent than in the instant case in view of the unusual and complex factual situations which characterize petitioners' CATV operations.

Although the details of the method by which petitioners receive the programs of the Spokane and Missoula stations and the technical method by which KGVO-TV in Missoula obtains its programs are unusually complex, some understanding of them is important to place in proper perspective what petitioners have been directed to do by Commission order without any hearing.

The Spokane television stations are located approximately 150 miles from Kalispell. They are received by Northwest Video, Inc. by means of an antenna structure located on Big Mountain, approximately

20 miles north of Kalispell, where they are delivered by cable to a microwave common carrier, Microwave Service Company. This carrier relays the signals via microwave to the CATV systems at Kalispell and Polson. These same signals are also relayed to Missoula, Montana, approximately 110 miles farther south. At Missoula, these signals are received by the local CATV system which utilizes them and in turn delivers them to KGVO-TV. KGVO-TV then broadcasts these same programs. The signal of KGVO-TV does not reach Kalispell, so KGVO-TV has installed an auxiliary reception device called a translator on the same Big Mountain on which the Spokane signals are first received. This translator then rebroadcasts the KGVO-TV signal to Kalispell, 21 miles away. The Kalispell CATV system is thus being asked to black out the same television programs which were initially received at Big Mountain but only after they have been carried over a circuitous 254-mile transmission path. (R. pp. 2-7, 61-76; Taylor Affidavit to Motion for Stay, pp. 2-6) This anomaly only exists because the Commission in its Second Report and Order, 2 F.C.C. 2d 725 (1966), established a translator as a fourth priority station for purposes of its non-duplication requirements.

The same complex and circuitous transmission and retransmission of programming is involved with respect to the Polson CATV system with the exception that Polson is located somewhat closer to Missoula and within the predicted Grade B contour of KGVO-TV. However, the KGVO-TV programming is also delivered to the community of Polson through a translator device as at Kalispell. (R. pp. 114-117)

Petitioners in their petitions for waiver to the Commission requested a Commission field investigation concerning their charges of technical inadequacy of signal and in addition, requested, apart from waiver, any other appropriate relief. (R. p. 60) Detailed engineering showings prepared by professional engineers were presented describing the signal deficiencies and the causes therefor with respect to reception of KGVO-TV in the Kalispell and Polson areas. (R. pp. 61-77) No substantial evidence to the contrary was offered by pleading or otherwise by any party and petitioners' extensive exhibits stand essentially un rebutted.

With respect to the exhibits of petitioner Flathead Lake Cable TV, Inc. concerning the Polson CATV system, the Commission dismissed petitioner's showing in one sentence: "Data submitted by petitioner, or incorporated in its petition, are insufficient to establish evidence of absence of reception in Polson." 10 F.C.C. 2d at 667. With respect to petitioner Northwest Video, Inc.'s showing concerning Kalispell, the Commission itself recognized that "there could remain some question concerning the signal of KØ9HA" but again summarily rejected petitioners' arguments with the short statement that "we do not believe Northwest Video has sustained its initial burden of alleging sufficient facts to warrant waiver or a hearing". Id. at 666. Due process demands more.

This cavalier approach to petitioners' showing was discussed and discarded in a recent decision of the United States Court of Appeals for the First Circuit which, in reversing a Commission order

denying an identical waiver request in substantially similar circumstances, describes the Commission's obligations in cases of this type. Presque Isle TV Co., Inc. v. United States, (C.A. 1. No. 6896, Slip Opinion, December 18, 1967. See Appendix to Joint Reply to Oppositions to Motion for Stay).

In Presque Isle TV, like here, a microwave-served CATV system requested a waiver of the non-duplication rules; like here, extensive engineering showings were made by the petitioner; like here, such showings were substantially un rebutted, by affidavit or otherwise before the Commission; and, like here, the Commission summarily rejected petitioner's showings on the ground that they were "inadequately supported . . ." (Slip Opinion, p. 8). It is fair to state that the First Circuit strongly criticized these Commission procedures. Stating that it could not understand the Commission's summary rejection of the petitioner's extensive and uncontradicted affidavit material, the court pointed out that they were "unexceptionable and uncontradicted" and that there "was no justifiable basis for the Commission sweeping them aside with a part of one sentence" (Slip Opinion, p. 8, Emphasis Added). Commenting on a number of possible courses of action which the Commission in Presque Isle might have taken (and which, like the instant case, it did not take) the court concluded as follows:

"The Commission, however, was unwilling to make these decisions, and its shutting its eyes to conspicuous facts is some measure of its unwillingness. Within broad limits the Commission may make policy determinations, but if review is to have any meaning the Commission cannot, in effect, back into them without openly making them, by ignoring the facts presented."
(Slip Opinion, p. 10.)

Petitioners submit the facts in the instant case are even stronger than those in Presque Isle. The decision there by the First Circuit is compelling and should be given great weight by this Court in its evaluation of the factual picture in this case. The Commission's cursory dismissal of petitioners' uncontroverted professional engineering exhibits is, indeed, an abuse of due process and evidences the Commission's prejudged presumption of CATV's alleged economic damage to television broadcast stations.

A. The Commission's Action is a Denial
of Due Process in Violation of the
Fifth Amendment

The Commission's failure to afford petitioners a full evidentiary hearing is a violation of the constitutional due process requirement of the Fifth Amendment. Petitioners submit, and believe respondents will agree, that the Commission's proscriptive order will substantially modify the conduct of their respective CATV businesses by petitioners.^{4/} To this extent petitioners submit that the language of the United States Court of Appeals for the District of Columbia Circuit in National Broadcasting Co. v. F.C.C., 362 F.2d 946 (D.C. Cir. 1966) aptly describes why a hearing should have been held in the instant case:

^{4/} Petitioners will be required to black out 75% of the programs of the three national networks as rebroadcast by KGVO-TV (See Taylor Affidavit to Motion for Stay, pp. 7-8) - 85 hours of television programming as presently carried on each of the two CATV systems would have to be deleted.

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"We have not been unmindful of the cardinal importance of the right to be heard where one's interests are acutely affected by the actions of an administrative agency. It is fundamentally abhorrent to our system of jurisprudence to deny a hearing to a litigant where justice and law require that a hearing be held." 362 F.2d at 953.

The Supreme Court of the United States also defined this fundamental tenet:

"[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. Hannah v. Larche, 363 U.S. 420 at 442 (1960).

This Court had occasion to examine due process requirements in Superior Oil Company v. F.P.C., 322 F.2d 601 (9th Cir. 1963), cert. denied, 377 U.S. 922 (1964) which concerned the denial of a hearing in an administrative proceeding. In noting that the rule challenged in that case was not adjudicatory in nature and did not affect any contractual right in existence at the time the rule became effective, this Court agreed that the "problem would be different if the effect of the rules was to proscribe rates already in effect". 322 F.2d at 615. In the instant case, the Commission sought to modify the business of the Kalispell CATV system which had been operating for over 14 years. This was a flagrant denial of due process. CAB v. Delta Airlines, 367 U.S. 316 (1960); Seatrains Lines v. United States, 64 F. Supp. 156 (1946), affirmed 329 U.S. 424 (1947).

The invalid character of the Commission's proscriptive order is readily apparent against the background of the court's decision in Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F.2d 18 (D.C. Cir. 1949). The court's rejection of an attempt by the agency to establish a special class of irregular air carrier through issuance of "letters of registration" which could be revoked without hearing was based on the fact that a revocation of this permit would destroy business and investment property, not only a type of license. In the instant case, petitioners, who are not licensees, also stand shorn of due process by an agency which substantially changes and threatens the existence of petitioners' business.

The destruction of a petitioner's assets was recently of concern to this Court in Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), cert. granted, 389 U.S. 911 (1967). Judge Ely's concurring opinion is appropriately relevant to this case:

"It is not unreasonable to assume that the petitioners considered this history [the Commission's disavowal of CATV jurisdiction] in making their determination to embark on their ventures. They then undertook their lawful pursuits investing substantial sums of money, and, incidentally, proceeding under the auspices of the responsible San Diego officials who issued the required municipal permits. Not until petitioners had incurred the expense of installing necessary and fixed facilities and had acquired subscribing customers did the Commission presume to issue the order which, if enforceable, would adversely affect if not destroy the Petitioner's investments.

"In the light of the only conferred powers under which its authority exists . . . and in the light of all the circumstances . . . I believe that the Commission trespassed upon constitutional safeguards against the confiscation of property." Southwestern Cable Co., supra. Note 63 at 10 (Concurring opinion). (Emphasis Added.)

It is also not unreasonable to state that the Commission's action is sadly lacking in the rudiments of fair play in its undisguised effort to protect the television industry. Petitioners' existing business and investment of 14 years in Kalispell, established a decade before the Commission asserted jurisdiction over CATV, is seriously threatened economically. The small Polson CATV system would suffer even more immediate economic disaster.

Guidelines for establishing when due process was violated in the face of severe economic injury were clarified by the court in Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964). In reversing an invalid action by the Secretary of Agriculture the court stressed considerations of basic fairness:

"The governmental interests on the one hand and the individual interests on the other must be balanced and the procedures established must be considered in light of various questions which courts have postulated from time to time: How was the individual likely to be hurt? What governmental interest was to be protected? How would the governmental interest be affected, if at all, by extending procedural safeguards to cover the challenged action?" Id. at 579.

On the basis of the uncontradicted facts in this case, the answers to the questions postulated by the court above are so clear that it seems incredible that no hearing was held in this case. No

governmental-television interest would be destroyed nor seriously threatened by holding an evidentiary hearing. Only petitioners' CATV businesses were likely to be destroyed.

B. The Communications Act and the
Administrative Procedure Act
Require a Hearing

It is plain that when a modification of a licensee's existing operation is proposed, the Federal Communications Commission offers its licensees due process safeguards which were denied petitioner as a non-licensed but regulated entity. An examination of certain portions of the Communications Act of 1934 reveals this inconsistent and basically unfair procedure.

Section 316, 47 U.S.C. 316, requires a full evidentiary hearing with the burden of proof placed upon the Commission before a license or a construction permit can be modified, but that is before the method of operation of a licensee can be changed. Although a CATV system is not a licensee, as petitioners are not, petitioners' method of operation is substantially changed here without hearing. It is contrary to due process to impose on CATV systems the type of authority imposed on licensees and at the same time to deny to the same systems the procedural protection of the Act because they are not licensees.

The due process basis of Section 312 of the Act, 47 U.S.C. 312, appears clearly pertinent also. Before revoking a license or permit, the Commission must serve a show cause order and again allow

a party a full evidentiary hearing with the burden of proof placed on the Commission.

When the Commission issued its proscriptive order requiring petitioners to provide program exclusivity within 30 days, its action was identical in nature to a cease and desist order under Section 312 of the Act. In Southwestern Cable Co. v. United States, supra, this Court recently reversed a similar attempt by the Commission to operate in this summary manner under the CATV Rules. In Southwestern Cable Co., the Commission imposed a freeze on the expansion of a San Diego CATV system. Petitioner in that case challenged inter alia the Commission's authority to issue such a "freeze" order.

The Commission argued that its action did not constitute a cease and desist order under Section 312, but was a grant of temporary relief under Section 74.1109(f). The Commission's authority for this grant of temporary relief was based on its rule making authority under Sections 4(i) and 303(r), 47 U.S.C. 4(i) and 303(r), of the Communications Act. However, this Court held that the order was indeed prohibitory in nature and amounted to a cease and desist order. As such, the safeguards of Section 312 were applicable. The court also concluded that since Sections 4(i) and 303(r) were limited to the scope of the Commission's licensing function, that as against a non-licensee, the Commission's only authority to issue proscriptive orders was limited to Section 312 of the Act with its attendant safeguards.

In the instant case, the Commission's order is patently proscriptive to the extent that it orders petitioner Northwest Video, Inc.

to cease and desist, without hearing, a substantial part of its existing business which has been operating for over 14 years! The Polson CATV system which has been operating for over one year faces economic ruin. At a minimum, the safeguards of Section 312 would afford petitioner protection against this arbitrary and unreasonable exercise of misapplied authority.

In this connection, petitioners also direct the court's attention to Section 309(e), 47 U.S.C. 309(e), of the Act which requires a full evidentiary hearing where a substantial and material issue of fact exists with respect to an application for license. Likewise, Section 303(m)(2), 47 U.S.C. 303(m)(2), provides for a hearing where the suspension of an existing license is proposed. Even a cursory examination of the nature of these sections must lead to the conclusion that the Commission was required to hold a hearing as a matter of law when, after asserting jurisdiction over the conduct of petitioners' business, it proceeded to modify substantially petitioners' method of business operation. Fundamental due process requires no other result.

The CATV Rules also conflict with the requirements of the Administrative Procedure Act, 5 U.S.C. 551, et seq. When the Commission denied petitioners' petitions for waiver, it denied a "license" within the meaning of 5 U.S.C. 151(8), it issued an "order" within the meaning of 5 U.S.C. 551(6), and it disposed of an "adjudication" within the meaning of 5 U.S.C. 551(7). Petitioners submit that the question of whether or not the KGVO-TV signal at Kalispell and at Polson is inferior is and remains an adjudicatory fact which must be adjudicated pursuant to the requirements of 5 U.S.C. 554 and 556.

See 1 Davis, Administrative Law, §7.02, pp. 412-415 (1958).

In summary, apart from the legal violation implicit in the Commission's action, the particular circumstances of the Kalispell and Polson CATV systems required that a hearing be held. A summary examination of the facts warrants this conclusion. The complex method of receipt and retransmission of the programs broadcast by KGVO-TV is in the record and has not been denied by the station nor by the Commission. Through the affidavits of professional engineers, the serious deficiencies of the quality of the translator signals at Kalispell and Polson caused by this method of retransmission were examined. Without significant rebuttal, the substantial portions of time during which the translator stations were off the air were enumerated. In response the Commission articulated its belief that with respect to Kalispell, Northwest Video had not sustained "its initial burden of alleging sufficient facts to warrant waiver or hearing". And, that with respect to Polson the "Data submitted by Petitioner or incorporated in its petition are insufficient to establish evidence of absence of reception in Polson". Thus, the Commission implicitly made a finding that the translators located at Kalispell and at Polson adequately served the community. But all of the evidence in these cases was to the contrary since petitioners' affidavits were uncontradicted.

Moreover, this implicit finding of the Commission with respect to Kalispell translator service is contrary to the Commission's own translator rules, since KØ9HA is located 16 miles beyond the

preferred five-mile translator-to-community distance specified in Section 74.737(b), 47 C.F.R. 74.737(b), of the Commission's Rules. Since no provision is made in the Commission's Rules for prediction or presumption of translator service, Midwest Television, Inc., 6 F.C.C. 2d 560 (1967), and since the KØ9HA translator location far exceeds the Commission's preferred limitation, petitioners had no presumption of service to overcome.

Illustrative of the Commission's summary dismissal of petitioners' engineering data is the following excerpt from the Memorandum Opinion and Order concerning the Kalispell CATV system:

"Northwest Video has supplied three engineering statements which, in the main, purport to show that the translator signal is comparatively inferior to the same signal obtained directly from the Spokane stations. KMSO-TV, Inc. has criticized these statements and pointed to serious discrepancies in them. In these circumstances, we do not believe that Northwest Video has sustained its initial burden of alleging sufficient facts to warrant waiver or hearing." (10 F.C.C. 2d at 666) (Emphasis Added.)

What circumstances? A review of the pleadings filed by KMSO-TV, Inc. shows that no "serious discrepancies" were revealed by KMSO-TV. The Commission's finding of the discovery of serious discrepancies by KMSO-TV is without foundation in fact. Since petitioners' engineering data stands uncontradicted, the Commission's language can only be viewed as an attempt to whitewash a finding made in the face of material questions of fact.

At the very least, petitioners' uncontradicted engineering statements raised material questions of fact which required a hearing -

not a summary rejection in a few words. In view of the foregoing, petitioners respectfully submit that this Court should remand this case to the Commission for hearing to resolve material questions of fact which remain totally unanswered.

Conclusion

Petitioners pray that the court set aside and declare unlawful the action of the Federal Communications Commission as set forth in its Memorandum Opinion and Order of November 17, 1967; that it determine as invalid the CATV Rules promulgated by the Federal Communications Commission; that it declare the CATV non-duplication rules, 47 C.F.R. 21.712 and 74.1103, invalid as a prior restraint in the receipt and distribution of information; or in the alternative, that this Court determine that petitioners are entitled to a full evidentiary hearing on their respective petitions for waiver; and that it therefore remand the matter to the Commission for an evidentiary hearing.

Respectfully submitted,

/s/ JOHN D. MATTHEWS

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ John D. Matthews

John D. Matthews

CERTIFICATE

I, Richard F. Swift, do hereby certify that, pursuant to Rule 18 of the United States Court of Appeals for the Ninth Circuit, copies of the foregoing "Brief for Petitioners" were mailed, postage prepaid by first-class mail on March 14, 1968, to the following:

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I further certify that in connection with the preparation of said brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

/s/ Richard F. Swift

Richard F. Swift

Subscribed and sworn to before me
this 19th day of March, 1968.

/s/ Mildred K. Jones

Notary Public

My Commission Expires: September 14, 1971

[SEAL]

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22418

NORTHWEST VIDEO, INC.,
FLATHEAD LAKE CABLE TV, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,
Respondents,

KMSO-TV, INC.,
Intervenor.

FILED

MAY 3 1968

WM. B. LUCK, CLERK

ON PETITION FOR REVIEW OF ORDERS OF THE
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22418

NORTHWEST VIDEO, INC.,
FLATHEAD LAKE CABLE TV, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,
Respondents,

KMSO-TV, INC.,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

This joint petition for review was filed pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), and Sections 2 and 3 of the Judicial Review Act, 28 U.S.C. 2342 and 2343.

The appeal arises from a memorandum opinion and order of the Federal Communications Commission, released November 17, 1967, which in pertinent part denied petitioners' request for waiver of Sections 21.712 and 74.1103 of the Commission's Rules (R. 155-182). These rules govern the rights of television broadcast

and translator stations to program exclusivity vis-a-vis CATV systems operating in their service areas. Because petitioners' statement of the case is argumentative and somewhat incomplete, the following counterstatement is submitted for the Court's assistance.

COUNTERSTATEMENT OF THE CASE

1. Background

Although petitioners challenge the Commission's jurisdiction to regulate CATV, we will not set out the entire background of CATV regulation or the bases of jurisdiction since this Court is currently confronted with this issue in other pending cases and is therefore familiar with the subject matter. Total Telecable, Inc. v. F.C.C., Case No. 21990; Valley Vision, Inc. v. F.C.C., Case Nos. 21869, 21870 and 21870-A. See also Southwestern Cable Co. v. F.C.C., 378 F.2d 118 (C.A. 9, 1967), cert. granted, 389 U.S. 911 (1967). In addition, petitioners do not treat this issue in their brief, choosing instead to rely on the arguments made by the petitioner in Case No. 22393, Great Falls Community TV Cable Co. v. F.C.C.^{1/} We will, however, set forth the principal considerations which led to the adoption of the program exclusivity, or "non-duplication" rule, the provision mainly at issue in this proceeding.

In the First Report and Order (38 F.C.C. 683) the Commission, after considering its statutory responsibilities,

^{1/} The petitioners in both cases have requested a consolidated oral argument.

noted that the commercial television system is based upon the distribution of programs to the public through a multiplicity of local station outlets, and that this policy had been recently reaffirmed by the Congress (38 F.C.C. 697-700, pars. 40-47). It found that CATV, while useful as an auxiliary service, must have a complementary role to the television broadcast station--not substitutionary or conflicting--for the following reasons (38 F.C.C. 699, pars. 44-45):

(1) The CATV cannot serve many persons reached by television broadcast signals because of the prohibitive costs of extending cable beyond heavily built-up areas. This means that people living outside the built-up areas and those who cannot afford or do not wish to pay are entirely dependent upon local stations for television service. Primary reliance cannot therefore be placed on the CATV since it is a "service which, technically, cannot be made available to many others."

(2) The local station serves as an outlet for community self-expression, presenting programming designed to serve the needs and interests of the local area. Conversely, very few CATV systems originate any local programming.

Having concluded that CATV serves the public interest "when it acts as a supplement rather than a substitute for off-the-air television service" (38 F.C.C. 701, par. 48), the

Commission turned to the basic conditions under which competition between the CATV and the local television station occurs (38 F.C.C. 701-706, pars. 49-57).^{2/} It found that the competition was marked by two features not present in the ordinary competition between broadcast stations, which were both unfair and inconsistent with the CATV's proper role as a supplementary service.

First, the Commission found, upon analysis, that the CATV which fails to carry the local station on its system has in practical effect cut off the station from access to the CATV subscriber (38 F.C.C. 702-703, par. 51). Second, the Commission noted that there has been built up, under both the Communications Act and the antitrust laws, a reasonable amount of exclusivity on the exhibition of TV programs within the station's market and for a particular time period (38 F.C.C. 703-704, pars. 52-53). The CATV, however, presently stands outside the established program distribution process, and brings into a local station's area the programs of distant stations, irrespective of the reasonable exclusivity which the local station has bargained for in the competitive TV market.^{3/}

In addition to the above considerations, the Commission considered the question of the impact of CATV competition on the development of television broadcasting service (38 F.C.C. 706-713,

^{2/} The two compete because when a cable system brings to a station market additional signals which would not be readily available in the system's absence, it introduces competition for audience attention--and audience attention is the basic commodity that a station sells to advertisers. 38 F.C.C. 702, par. 50.

^{3/} Cf. United Artists Television, Inc. v. Fortnightly Corporation, 255 F. Supp. 177, 180 (D.C.S.D.N.Y. 1966), affirmed 377 F.2d 872 (C.A. 2, 1967), cert. granted, 36 U. S. Law Week 3226 (1967).

pars. 58-75). In doing so, it analyzed the economic data which had been presented and took into account information which had been acquired in case-to-case adjudication (38 F.C.C. 708-711, pars. 64, 68-69). Noting the explosive growth of CATV and its changing nature (38 F.C.C. 709, par. 65), as well as the increasing penetration of television stations' service areas (38 F.C.C. 709-710, pars. 66-67), the Commission concluded that remedial action was warranted (38 F.C.C. 713-15, pars. 76-79):

* * * We believe that the imposition of minimum carriage and nonduplication requirements by rule is required in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential. * * * Corrective action after the damage has already been done, if not too late, is certainly much more difficult. * * * This is one of those situations in which the public interest requires that conditions conducive to the sound future of television 'be assured rather than left uncertain.' United States v. Detroit Navigation Co., 326 U.S. 236, 241. This is particularly so where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of ensuring the healthy growth and maintenance of the basic service.

As a result of all these considerations, the Commission adopted Section 21.712, 47 CFR 21.712, its carriage and nonduplication^{4/} rules for microwave-served CATV systems. The need for such rules

^{4/} Section 74.1103 is the corresponding rule for non-microwave-served CATV systems. The two rules are identical in substance. Section 21.712 is the more relevant rule in this case since both CATV systems are microwave-served. References hereafter will be to Section 21.712 only.

was reaffirmed in the Second Report and Order (2 F.C.C. 2d at 745-56, pars. 47-75) where the Commission broadened the scope of the regulations to include all CATV systems, finding them "essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service" (2 F.C.C. 2d at 746, par. 47).

Section 21.712 of the Rules provides that a CATV system will be required upon request and within the limits of its channel capacity, to carry without material degradation the signals of all local television stations within whose grade B service area ^{5/} the CATV system is located, in order of priority of signal grade. ^{6/}

In addition, and more relevant to this appeal, the rule provides that a CATV system will be required, upon request, to avoid duplication of the programs of local television stations carried on the system during the same day that such programs are broadcast by the local stations. This nonduplication protection

^{5/} The Commission classifies television service areas into two grades. "Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90% of the time at the best 70% of receiver locations at the outer limits of this service. In the case of Grade B service, the figures are 90% of the time and 50% of the locations." Sixth Report and Order, 1 Pike & Fischer, R.R. 91:601 at 630 (1952). Cf., Clarksburg Publishing Co. v. F.C.C., 96 U.S. App. D.C. 211, 215-216 n. 12, 225 F.2d 511, 515-16 n. 12 (1955).

^{6/} Under the rule, television signals are divided into four priorities: (1) principal community, (2) Grade A, (3) Grade B, and (4) translator stations.

applies to "prime time" network programs (i.e., those presented by the network between 6 p.m. and 11 p.m.) only if such programs are presented by the local station entirely within what is locally considered to be "prime time". Furthermore, a local station is only entitled to nonduplication protection on a cable system "against lower priority or more distant duplicating signals, but not against signals of equal priority * * *." Section 21.712(g). Finally, the CATV system need not delete reception of a network program, if in doing so, it would leave available for reception of subscribers, at any time, less than the programs of two networks, or would deprive them of color reception of the program.

^{7/}
Section 21.712(i).

^{7/} The substance of Section 21.712 has been reviewed and upheld as a lawful and reasonable exercise of authority. See, e.g., Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 320, (D.C. Cir., 1967); Carter Mountain Transmission Corp. v. F.C.C., 321 F.2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951; Idaho Microwave, Inc. v. F.C.C., 352 F.2d 729 (C.A.D.C. 1965); Wheeling Antenna Company, Inc. v. U.S.A. and F.C.C., ___ F.2d ___, (C.A. 4, decided February 28, 1968); Conley Electronics Corp. v. F.C.C., ___ F.2d ___, (C.A. 10, decided April 22, 1968).

2. The Present Proceeding

Petitioners are commonly-owned CATV systems. Northwest Video operates a system in Kalispell, Montana, and several nearby small communities and subdivisions. Flathead Lake Cable operates a system in Polson, Montana. Northwest Video carries five signals on its system: ^{8/} three network stations from Spokane, Washington, one Canadian station, and KGVO-TV, Missoula, Montana, as rebroadcast by translator station KØ9HA in Kalispell. ^{9/} All of the signals, except KGVO-TV, are received via microwave. On May 12, 1966, pursuant to Sections 21.712 and 74.1103 of the Rules, KMSO-TV, Inc., licensee of KGVO-TV and KØ9HA, requested non-duplication protection from Northwest Video. ^{10/} Northwest Video did not comply, instead filing a petition for waiver of the rules with the Commission on June 17, 1966.

Flathead Lake Cable's system receives and carries the same signals as does Northwest Video except that KGVO-TV is received via a 1-watt translator in Polson. On March 30, 1967, KMSO-TV requested non-duplication protection for KGVO-TV. ^{11/}

^{8/} In another part of the decision under review, the Commission granted the application of Western Microwave, Inc. to provide three Salt Lake City television signals to Northwest Video's Kalispell CATV system.

^{9/} An application was on file with the Commission to replace the translator with a satellite broadcast station (BPCT-3985). This application was granted on December 20, 1967 (Public Notice Mimeo No. 10310).

^{10/} KØ9HA, as a 100-watt translator station, is entitled to a priority under Section 21.712.

^{11/} KSVØ-TV's priority under Section 21.712 stems from the fact that its Grade B contour covers Polson.

Flathead Lake Cable also did not comply, choosing instead to request a waiver of the rule on April 17, 1967.

In a Memorandum Opinion and Order released November 17, 1967, the Commission denied both waiver requests and gave petitioners 30 days to comply (R. 155-182). In both cases the Commission found petitioners' allegations either irrelevant or unsupported (R. 170, 172). The result of this decision is that petitioners would have to delete any program emanating from the four distant stations if that program was being broadcast by KGVO-TV during prime-time on the same day. The subscribers to the CATV systems would not lose a single program. In addition, no one Spokane signal would be deleted all of the time because KGVO-TV broadcasts programs from all three networks.^{12/}

Petitioners duly filed a joint petition for review of the above action. They also requested that the effect of the Commission's decision be stayed pendente lite. On January 10, 1968, this Court granted the stay request pending disposition of the petition for review.

^{12/} The Canadian station and KGVO-TV apparently have no programs in common.

QUESTIONS PRESENTED

Respondents believe that a threshold question presented by this appeal is:

Whether Section 405 of the Communications Act, 47 U.S.C. 405 bars review of petitioners' claims of error since they were not raised before the Commission.

If the Court should find that the issues raised by petitioners are properly before it, we believe the questions presented may be stated as follows:

Whether the Commission has the authority to require that CATV systems which are served by FCC-licensed microwave facilities must, in order to receive that service, afford nonduplication to local stations.

Whether the nonduplication provision is an unconstitutional restriction on free speech.

Whether the nonduplication rule is reasonably related to the public interest standard of the Communications Act.

Whether an evidentiary hearing was required on petitioners request for a waiver of the rule.

ARGUMENT

Petitioners have chosen not to brief certain arguments which were raised in the petition for review. Instead they have adopted the brief of petitioner Great Falls Community TV Cable Co., Inc. in Case No. 22393 in this regard. Accordingly, rather than duplicate our response, we will adopt the arguments made in our brief in Case No. 22393 as to those issues. The issues in question involve the Commission's jurisdiction over CATV (both microwave-served and off-the-air), the nonduplication rule versus freedom of speech, and whether the rule is a restraint of trade.

Like petitioner in the Great Falls case, petitioners here did not raise any of these issues before the Commission. Thus, like Great Falls, they are precluded by statute from raising them now. Section 405 of the Communications Act, 47 U.S.C. 405, states that no "question of fact or law" may be raised on appeal which a petitioner has not first raised before the Commission. The decisions of the courts support the proposition that questions of fact or law which are raised for the first time on appeal will not be considered. Unemployment Commission v. Aragon, 329 U.S. 143 (1946); United States v. Tucker Truck Lines, 344 U.S. 33 (1952); Albertson v. F.C.C., 243 F.2d 209 (C.A.D.C. 1957); Florida Gulfcoast Broadcasters v. F.C.C., 352 F.2d 726 (C.A.D.C. 1965). See also the recent application of Section 405 by the First Circuit

in Presque Isle TV Co. v. United States, 387 F.2d 502 (C.A. 1, 1967), wherein petitioner had sought a waiver of a CATV rule without challenging the Commission's jurisdiction, and the court upheld the Commission's claim that the jurisdiction issue was not properly before it.

Likewise, the one issue which petitioners here have briefed, whether a hearing was required on the waiver requests, was not raised before the Commission. The papers before the agency make no reference whatever to the need for a hearing, either as a matter of law or because of the particular facts of these cases. Accordingly in light of 47 U.S.C. 405 and the cases cited above, we submit that this issue is not properly before the Court and may not be considered. See also Western Airlines v. C.A.B., 196 F.2d 993 (C.A. 9, 1952). The following argument, in which we show that in any event no hearing was necessary on petitioners' waiver request, assumes arguendo that the issue was properly raised.

I. THE COMMISSION PROPERLY DECLINED TO HOLD
A HEARING ON PETITIONERS' REQUESTS FOR
WAIVERS OF THE NONDUPLICATION RULE.

Petitioners' argument that the Commission erred in denying their petitions for waiver without an evidentiary hearing is divided into three parts: (1) the failure to hold a hearing is a denial of due process under the Fifth Amendment; (2) certain provisions of the Communications Act require a hearing; and (3) apart from legal considerations, petitioners' waiver showings raised factual disputes sufficient to warrant a hearing. We will deal with these sub-arguments seriatim.

A. Denial Of A Hearing Did Not Deprive Petitioner
Of Due Process Of Law.

Initially petitioners make the broad claim that a hearing is required as a matter of due process of law since the issuance of the order to comply with the rules disrupts existing arrangements, depriving petitioners of the full use of their property.

As we have discussed above, the nonduplication rule is designed to carry out the valid objective of imposing upon CATV systems that degree of regulation which will insure that CATV service will be of maximum benefit in distributing television signals to the American public without destroying the basic television service which gives them their substance. This rule was adopted after a proceeding which complied fully with the procedural requirements of the Administrative Procedure Act, 5 U.S.C.

The law is well settled that in such circumstances individuals subject to governmental regulation may constitutionally

13/ With respect to regulatory efforts of the Commission's predecessor, the Federal Radio Commission, the Supreme Court stated:

* * * This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises.

Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.,
289 U.S. 266, 282 (1933)

be deprived of certain property rights without the necessity for individual adjudication of their claims. See e.g., Airline Pilots Association, Int'l v. Quesada, 276 F.2d 892 (2nd Cir., 1960). In that case the Court was faced with an argument similar to that made here. The Federal Aviation administrator had promulgated after a rulemaking only, a new rule barring individuals over 60 years old from serving as pilots. Many pilots were thereby deprived not of a portion of their business investment, but rather of their basic livelihood. Said the Court:

Nor does the regulation violate due process because it modified pilots' rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. * * * Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicatory hearings including appeals to the courts, and each pilot whose license was affected -- here some 18,000 -- might demand to be heard individually. 276 F.2d at 896.

This reasoning has been recently applied by the Tenth Circuit in a case on all fours with the one at bar. Conley Electronics Corp. v. F.C.C., ___ F.2d ___, decided April 22, 1968. There a CATV system contested on due process grounds the Commission's denial without hearing of a waiver request. Quoting the above language from Airline Pilots the Court concluded that due process

did not require a hearing before a CATV system could be ordered to afford nonduplication protection in accordance with a duly adopted agency rule. See also Bi-Metallic Investment Co. v. State Board, 239 U.S. 441, 445 (1915); Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir., 1949), cert. denied 338 U.S. 860.

In sum since petitioners had every procedural opportunity to which they were entitled in a valid rulemaking proceeding, they were not deprived of any constitutional rights of due process of law.

B. Petitioners Had No Statutory Right To A Hearing.

Petitioners next argue that they were entitled to a hearing as a matter of statutory right. In so arguing petitioners misread the cited statutory provisions of the Communications Act and the Administrative Procedure Act. As noted before, the non-duplication rule was originally adopted as the result of a rule-making proceeding in which all interested parties were permitted to participate. See First Report and Order, 38 F.C.C. 683 (1965). After further proceedings in which notice and opportunity to comment were given to interested parties, the rule was changed so as to reduce the 15 day duplication ban to a prohibition against duplication within a 24 hour period. Second Report and Order, supra. Petitioners allege no irregularities with respect to the procedures followed by the Commission in adopting this rule, and, in fact, these proceedings have been expressly upheld by the Court of Appeals for the District of Columbia Circuit in Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 320, (D.C. Cir., 1967).

The asserted statutory basis for a hearing stems from the following provisions of the Communications Act: §309(e), which provides for a hearing upon any application for a license where there exists a substantial and material question of fact; §303(m) (2), which requires a hearing prior to the suspension of an

operator's license; §312(c), which provides for a hearing prior to revocation of a license; and §316, which bars any modification of a license without a hearing. Dealing with precisely the same argument that petitioners make here, the Tenth Circuit stated in Conley, supra: "The short answer is that [petitioner], by its own admission, is neither an applicant for a license nor a licensee. It is clear, therefore, that the various statutory provisions relied upon are inapplicable by their own terms." ^{14/}

14/ Elsewhere in their brief, petitioners seem to contend that the Commission's order was actually a cease and desist order within the meaning of Section 312(b) and that a show cause proceeding pursuant to that section was required. Under Section 312 the Commission may issue cease and desist orders to any person failing "to observe any rule or regulation of the Commission" authorized under the Act. A cease and desist order may be entered only after a hearing in which the person involved has been afforded an opportunity to show cause why the order should not be issued. And the proceedings are reviewable only in the Court of Appeals for the District of Columbia Circuit, 47 U.S.C. 402(b)(7).

Here the Commission did not purport to act under Section 312, nor did it even hold that its rules had been violated. It simply had before it a petition for waiver of one of its rules filed by petitioner. The waiver procedure is set forth in considerable detail in Section 74.1109 of the rules and the Commission's action was taken pursuant to and in accordance with the procedures specified therein. A petition for waiver operates to stay compliance pending a determination of the merits of the waiver request.

While the Commission's order contained a clause directing petitioners to comply with the rule within thirty days, that clause was inserted only to give petitioners notice of a date certain when they would be expected to be in compliance with the rule; aside from this the ordering clause added nothing to the obligation imposed on petitioners. And once the waiver was denied, it was the rule itself, adopted after proceedings in which petitioners had a full opportunity to participate, which compelled the nonduplication protection at issue here. "Rather than a cease and desist order, we think the Commission's order was merely a directive giving . . . notice of a date certain when it would be expected to be in compliance with the nonduplication rule." Conley Electronics Corp. v. F.C.C., supra.

However, even if petitioners fell within the terms of these provisions, it is clear that they do not require an evidentiary hearing under the present circumstances. For here, petitioners are simply being required to comply with duly adopted rules, of future effect only, and applicable to nearly all of the hundreds of CATV systems throughout the country. It is well settled that even where existing statutes afforded individual parties a hearing before existing rights can be changed, no such hearings are needed before general rules can be applied. See Federal Power Commission v. Texaco, 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); California Citizens Band Association, Inc. v. U.S., 375 F.2d 43 (9th Cir., 1967), cert. denied, ___ U.S. ___; American Airlines v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir., 1966), cert. denied, 385 U.S. 843 (1966); and Airline Pilots Association, International v. Quesada, 276 F.2d 892 (2nd Cir., 1960). The statutory references and cases cited in petitioners' brief are not in point because they are addressed to situations in which individuals are singled out for unique treatment.

The foregoing principle has been followed in cases arising from the Commission's refusal to waive its CATV rules. Dealing with essentially the same kind of claim being asserted here, the Fourth

Circuit stated (Wheeling Antenna Company, Inc., supra, slip opinion, p. 6):

At its option the Commission may, as it did here, adjudicate by reference to a pertinent general rule. Cf. Securities Comm'n v. Chenery Corp., 332 US 194, 203 (1947). In the present circumstances no hearing was demandable. FPC v. Texaco Inc., 377 US 33, 44 (1964); United States v. Storer Broadcasting Co., 351 US 192, 205 (1956). Otherwise, the Commission would be intolerably and impractically embroiled in a multiplicity of trials. This does not mean, of course, that a petitioner goes unheard. It means only that the Commission may make its judgment on the petitioner's papers. The decision then becomes reviewable in whatever manner the statute may permit.

Similarly in the Conley case the Court, relying on the authorities cited above, concluded that no hearing was required by statute on the waiver request.

These cases are we submit dispositive of petitioners' claim that they have a statutory right to a hearing. We show in the following section, that under the particular facts of this case it was well within the Commission's discretion to resolve the waiver question on the basis of the papers submitted.

C. The Showing Contained In Petitioners' Waiver Requests Were Inadequate To Justify A Departure From The Nonduplication Rule.

We pointed out in the opening section of our brief that petitioners never requested a hearing on their waiver request, and that for this reason they are foreclosed as a matter of law from arguing the question on review, 47 U.S.C. 405. But aside from this we submit that as a practical matter petitioners are in a thoroughly untenable position in asserting the need for a hearing now. For if no hearing were requested how can it be argued that the agency acted unreasonably in refusing to grant one? Cf. New England Air Express, Inc. v. C.A.B., 194 F.2d 894 (C.A.D.C. 1952); Western Airlines v. C.A.B., 196 F.2d 993 (C.A. 9, 1952). If the matter were one of Constitutional or statutory right perhaps it could be argued that no request was necessary. But as we have shown no such right exists. Moreover the section of the Commission's rules which deals with requests for waiver of the CATV rules requires that the petition "shall state the relief requested" and provides for the submission of alternate requests for relief. 47 CFR 74.1109(c)(1). Petitioners' failure to ask for a hearing militates strongly, we submit, against the grant of such relief now.

Wholly aside from this, however, it is clear that the record below amply supports the Commission's denial without hearing of the waiver request. In United States v. Storer Broadcasting Co.,

351 U.S. 192 (1956), the Supreme Court set forth the appropriate standard for judging requests for waiver of agency rules:

As the Commission has promulgated its rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for hearing. 351 U.S. 192 at 205.

See also Federal Power Commission v. Texaco, Inc., 377 U.S. 33 (1964).

Section 74.1109(c) (1), 47 CFR 74.1109(c) (1), providing for waivers of the CATV rules, specifies that the showing in justification thereof must be substantial:

[The petition] shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

In a recent CATV case involving waiver of a section of the rules (not involved here) which required hearings before certain signals could be carried by CATVs, the Court of Appeals for the District of Columbia Circuit observed that waiver petitions must meet a high evidentiary standard: "We do suggest, however, that in the emerging field of CATV, with respect to petitions for waiver of evidentiary hearings, the Commission should require greater factual specificity in petitions for waiver and in the

proof * * *." Channel 9 Syracuse, Inc. v. F.C.C., 385 F.2d 969, 975 (1967).^{14a/} These considerations apply even more strongly to the present case, since waiver is being sought, not of a hearing requirement, but of a substantive rule which represents a settled determination as to where the public interest lies.

Petitioners state (Br. p. 13, pp.22-23) that their showing as to alleged deficiencies in the signal of KGVO-TV in the Kalispell and Polson areas justified duplication of the station's programs from other sources. In support of this contention it was alleged that the programming which KGVO-TV rebroadcast from Spokane was received through a tortuous and complex process which caused degradation of the signal. We submit, however, that the record affords ample basis for the Commission's conclusion that the presence of the KGVO-TV signal in the area is sufficiently strong to require adherence by the systems to the nonduplication rule.

In the first place, even if true, this allegation would not warrant a departure from the rule because less than one-quarter of the station's programming is received in the manner described by petitioners (R. 106). The rest is either locally originated or received from Salt Lake City via microwave. No allegations

^{14a/} See also Cedar Rapids Television Co. v. F.C.C., __ U.S. App. D.C. __, 387 F.2d 228 (1967).

were made that this programming resulted in an inferior signal.^{15/}

As to KØ9HA's signal itself, this translator is licensed to Kalispell and has been in operation for over two years. There have been no complaints about the quality of its signal and in fact favorable comments abound (R. 28-42). The elaborate transmission and retransmission of broadcast signals by wire and microwave over vast distances is, moreover, commonplace in today's communications technology. Signals are carried across the country by devices not unlike those described by petitioners, yet no objectionable degradation occurs. Moreover, the record shows that advertisers regularly buy time on the station to reach viewers in Kalispell and the neighboring communities served by this station.^{16/}

Flathead Lake Cable's waiver request made the same allegations as Northwest Video plus the argument that compliance with the nonduplication rule would alter viewing habits since protection

^{15/} Cf. Wheeling Antenna Co. v. U.S., supra, where the local station served only 20% of the community with a viewable signal. The Court nevertheless upheld the Commission's judgment that nonduplication protection was warranted.

^{16/} Furthermore, this entire signal quality matter is being independently obviated by the advent of a regular television broadcasting station in Kalispell which will replace the translator. On December 20, 1967, KMSO-TV, Inc., the licensee of KGVO-TV and KØ9HA, received a construction permit to build a new television station. About 90% of its programming will be received from KGVO-TV.

would involve programming from two different time zones. As for the time zone allegation, the Commission held that "program exclusivity from adjoining time zones is, rather than grounds for waiver, an objective of the same-day program exclusivity requirement." (R. 172) (See also R. 166.) The Commission's discussion of this facet of nonduplication in the Second Report and Order, 2 F.C.C. 2d at 749, para. 56, clearly shows that the facts presented by this case, far from warranting an exemption, constitute a classic illustration of the kind of situation the rule was intended to remedy.

As to the signal strength of the Polson facility, what we have said above regarding Kalispell is equally applicable here. Moreover, it is undisputed that Polson falls within KGVO-TV's predicted Grade B contour. Where this is so, the Commission has held that a waiver will be considered only on a showing that the actual contour as determined by field intensity measurements does not encompass the community where the system is located. Amendment to CATV Rules, 6 F.C.C. 2d 309, 313, (1967). No such showing was submitted here.

There remains petitioners' reliance on the Presque Isle ^{17/} case. There the Court remanded a Commission decision on the ground that it did not set forth reasons for the action taken. The question of a hearing vel non was not decided, and accordingly

^{17/} Presque Isle TV Co. Inc. v. U.S., 387 F.2d 502 (C.A. 1, 1967).

the case is inapposite.

Factually, moreover, Presque Isle is quite unlike the present case. There the local station asked for ad hoc 15-day non-duplication protection against a Canadian station which pre-releases network programs several days in advance of the United States showing. If the Canadian station were in the United States, it would have had priority under the non-duplication rule because its signal is equal to or stronger than the local station in the ^{18/}CATV community. The situation was one that was simply not covered by the rule, so the station requested and received extraordinary ad hoc relief. Under these circumstances the Court held that it was incumbent on the Commission to specify in greater detail the reasons for its action.

On the other hand the present case is exactly like the Wheeling and Conley cases already cited where the local stations requested and received the protection to which the Commission's rules entitled them. A major issue on appeal in each case was whether a hearing should be held, and in each instance the argument was rejected by the Court. Distinguishing Presque Isle, the Court in Wheeling stated (at footnote 6):

Presque Isle Co. v. FCC, ___ F.2d ___ (1st Cir. 1967), urged by WACO, is inapposite. There the Court remanded a case decided in a summary fashion by the FCC. That case, unlike this one, presented a fact situation which did not fit within the explicit terms of the rules.

^{18/} See Northern Microwave Service, Inc., FCC 68-322, released March 22, 1968, para. 11.

Under the Communications Act Congress has left largely to the Commission's discretion "the determination of the manner of conducting its business which would most fairly and reasonably accommodate" the proper dispatch of its business and the ends of justice. F.C.C. v. WJR, 337 U.S. 265, 282 (1949); see also 47 U.S.C. 154(j). We submit that no abuse of that discretion has been shown.

CONCLUSION

For the reasons stated, the Commission's action should be affirmed.

Respectfully submitted,

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April 29, 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stuart F. Feldstein

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LOUIS RALPH MONTANO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,420

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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FILED

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I.

JURISDICTIONAL STATEMENT OF FACTS

The Government accepts the Jurisdictional Statement of Facts of Appellant with the following addition: At trial Appellant had retained counsel, and on appeal, Appellant had appointed counsel.

(Hereinafter the Transcript of the Record, Volume I will be referred to as "RC"; the Reporter's Transcript of the testimony at trial will be referred to as "RT," the number following will refer to the page, and the number following "L" will refer to the line; the Appellant will be referred to as "Montano" or "Appellant.")

II.

STATEMENT OF FACTS

The Government accepts the Appellant's Statement of Facts.

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The Trial Court did not err in denying Appellant's Motion to Suppress.

2. The Trial Court did not err in denying Appellant's Motion to Order Government witnesses to make disclosure to Appellant.

3. The Trial Court did not err in denying Appellant's Motion for Mistrial based on a statement made in the opening statement by Government's Counsel.

4. The Trial Court did not err in admitting the Government's exhibits which contained marihuana.

5. The Trial Court did not err in refusing Appellant's requested instruction number 1.

6. The Trial Court did not err in refusing the questions proposed by Appellant in chambers for voir dire of the jury.

IV.

SUMMARY OF ARGUMENT

1. A search of a vehicle at a port-of-entry whose occupants stated they came from Mazatlan, Mexico, i.e., the interior of Mexico was a border search.

2. The Motion to Order Government Witnesses to Make Disclosure was linked to a Motion to Continue Trial and was properly refused in view of the Government's Response in its Opposition to the Motions.

3. The statement in the Government's Opening Statement which was not admitted into evidence was harmless error, if error it was.

4. The marihuana exhibits contained bulk marihuana, i.e., the plants, stems and seeds, as well as the leaves, and are *Cannabis sativa* L. as defined in 26 U.S.C.A., §4761.

5. There is no basis in law for Defendant's Requested Instruction Number 1.

6. The Trial Court did not abuse its discretion in conducting the voir dire of the panel.

V.

ARGUMENT

1. A search of a vehicle at a port-of-entry whose occupants stated they came from Mazatlan, Mexico, i.e., the interior of Mexico, was a border search.

The Motion to Suppress was submitted on stipulated facts, but as was brought out in the testimony at trial by Edmund Eccleston who saw the car Appellant was driving approach the port-of-entry from Mexico:

"A I asked them their citizenship and asked them where they were coming from and asked them if they brought any merchandise with them from Mexico.

"Q What was answered by Mr. Montano?

"A Both declared to be U.S. citizens and they were coming from Mazatlan and were bringing no merchandise at all.

"Q What did you do?

"A Well, they were coming from Mexico, the interior, which is south of the town of Nogales, Sonora, we refer all cars to secondary inspection coming from the interior. So then I informed them to go to the secondary for further inspection and announced on the public address system that the car, told them it was coming down, which we do with all cars coming from the interior.

"Q Do you have a code or signal for that?

"A Yes, we do.

"Q What is it?

"A A car coming from the interior is called 101.

"Q Did Mr. Montano say anything after you told him he was going to secondary?

"MR. HIRSH: Pardon me. Let me again object to this on the grounds of insufficient foundation by the Government for any statements by this defendant.

"THE COURT: No. This is merely on his entry into the United States. The objection is overruled.

"A Mr. Montano wanted to continue on, he had trouble with the transmission of his car and didn't want to stop because he was afraid he couldn't get his car going again. I told him he would have to go on down, that it was for further inspection.

"Q (By Miss Damos) And did they drive toward secondary?

"A Yes, they did." (RT 20, L 9 to 21, L 16)

When the car's luggage was searched in secondary, the Inspector noticed a space between the rear seat and the luggage compartment; he jabbed at it and there was resistance.

He pulled the divider inside and felt a bag there (RT 34, L 10-19).

Appellant, citing from *Marsh v. United States*, (5th Cir., 1965) 344 F.2d 317, states: "That Court further stated that the reasonableness of the border search and the necessity for probable cause to search those lawfully within the country are both clearly stated in *Carroll v. United States*, 267 U.S. 132 (1925)."

The statutory basis for a border search is 19 U.S.C.A. 482. It is:

"482. SEARCH OF VEHICLES AND PERSON

Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. §3061."

The historical note gives the derivation of 19 U.S.C.A. 482 as Act, July 18, 1866 c. 201 §3, 14 Stat. 178.

The United States Supreme Court in *Boyd vs. United States*, 116 U.S. 616, 29 L.Ed. 746, 6 Sup. Ct. 524, traced the history of the third section of Chapter 201. It stated that statutes

provided for seizure of forfeited goods and had been authorized for two centuries prior to the adoption of the U.S. Constitution and since the first statute passed by Congress to regulate the collection of duties contained provisions to this effect (Act of July 31, 1789, 1 Stat. at Large 29, 43, Chap. 5) was passed by the same Congress which proposed for adoption the first amendments to the Constitution, ". . . it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the (Fourth) Amendment," *Boyd vs. United States*, supra, at page 623.

This Court in *Murgia vs. United States*, (9th Cir., 1960) 285 F.2d 14, at page 17, reiterated this principle. "(The) searches of persons entering the United States from a foreign country are in a separate category from searches generally** (and) 'are totally different things from a search for and seizure of a man's private books and papers***.' "

Thus the principle has long been recognized, in fact, from the inception of the Fourth and Fifth Amendments that border searches are in a separate category.

This Court in *Murgia vs. United States*, supra, quoted with approval from *Landau vs. United States, Attorney for Southern District*, 2 Cir., 1936, 82 F.2d 285, which stated the broad effect of the border search rule. The court therein stated at page 286:

"As early as 1799, the baggage of one entering the country was subject to inspection (1 Stat. 662). The necessity of enforcing the customs laws has always restricted the rights of privacy of those engaged in crossing the international boundary. See *Carroll v. United States*, 267, U.S. 132, 154, 45 S. Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790. *Neither a warrant nor an arrest is needed to authorize a search in these circumstances.* In the instant case, there was no disturbance of the appellant, his residence, or his effects

after a completed entry. It was to these evils that the Fourth Amendment was directed. *Boyd vs. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746. It has been said 'Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.' See *United States v. Kirschenblatt*, 16 F. (2d) 202, 203, 51 A.L.R. 416 (C.C.A.2). *Although inspection of the person and baggage upon entry may be carried so far, or be so conducted, as to constitute an unreasonable search*, it is clear that such is not this case." (emphasis supplied).

Clearly, then whether there is in fact an arrest or not, the test is reasonableness which is a strict test, to quote from *Blackford vs. United States* (9th Cir., 1957) 247 F.2d 745, at page 750:

"Thus, we must apply the test of reasonableness to the conduct of the officers in the case at bar. This is a stricter test than (sic.) that applied to state proceedings under the Due Process Clause of the Fourteenth Amendment in *Rochin and Breithaupt*. The test there is whether the alleged activity of law enforcement officers in obtaining the questioned evidence fell short of civilized standards of decency and fair play. There may be, we conceive, conduct which, while unreasonable, is not so unconscionable that it 'shocks the conscience' or 'offend[s] a sense of justice.' *Rochin*, 342 U.S. at page 172, 72 S.Ct. at page 208. On the other hand, if conduct is reasonable, it must perforce satisfy Due Process requirements. Accordingly, if the actions here questioned were reasonable, they did not constitute a violation of either the Fourth or Fifth Amendments."

Title 19 U.S.C.A., §1461, provides:

"All merchandise and baggage imported or brought in from any contiguous country, except as otherwise provided by law or by regulations of the Secretary of the

Treasury, shall be unladen in the presence of and be inspected by a customs officer at the first port of entry at which the same shall arrive; and such officer may require the owner, or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise, or other container, or of any closed vehicle, to open the same for inspection, or to furnish a key or other means for opening the same. June 17, 1930, c. 497, Title IV, §461, 46 Stat. 717."

Thus, when the Inspector found an unaccounted for space, and pressed the panel and found resistance, surely it cannot be argued that when the Inspector put his arm into this space and found a sack the search was unreasonable.

2. The motion to order Government witnesses to make disclosure was linked to a motion to continue trial and was properly refused in view of the Government's response in its opposition to the motions.

Appellant filed a "Motion for Continuance and Order Ordering Government's Witnesses to Make Disclosure to Defendants" two days before the second time a trial was scheduled. (RC Item 10)

As was stated by the Government in its response opposing the Motion to Continue:

"This Response of Government and Memorandum in Opposition to Defendants' Motion to Continue, by Edward E. Davis, United States Attorney for the District of Arizona, by Jo Ann D. Diamos, Assistant United States Attorney, is submitted in response to Defendants' Motion for Order directing Government's witnesses to talk to defense attorneys and for continuance of the trial date.

The records of this case show that this case was set for trial March 28, 1967. Defense attorneys then requested

a continuance and this case was then set for trial on September 14, 1967.

Some eight months after their arraignment Defendants filed a Motion to Suppress. Now, some two days before the date set for trial, again the Defendants are seeking a continuance. Counsel admit that Government's counsel made its file available to defense counsel. They not only had the probable list of Government witnesses, but a summary of their testimony. Now defense counsel seek an order compelling Government witnesses to talk to defense counsel. What the Court wishes to do—this aspect of the Motion lies in its sound discretion. However, it is respectfully submitted, the motion for continuance becomes an abuse by defendants' counsel. Another continuance would only weaken the Government's case by permitting the trial to be put off again.

As the Court knows, the Motion to Suppress was submitted on stipulated facts, i.e., the two defendants sought entry into the United States from Mexico at the Grand Avenue Port of Entry, they were referred to the secondary inspection area because they stated they came from the Interior, and here the contraband was found. The facts therefore are relatively very simple.

What defense counsel seek is to have the Government be compelled to lay its entire case before Defendants, to have the matter then tried at some unknown date in the future and then face the probable argument of how can Government witnesses recall facts so long after the event, i.e., January, 1967 to trial date.

It is respectfully submitted, that in view of both defense counsels' previous trial experience in this Court, the Motion to Continue should be denied, and the Government prays the Court exercise its sound discretion in acting on the Motion to compel the Government's witnesses to talk to defense counsel." (RC Item 11)

The Court denied the Motion to Continue and Order Or-

dering Government's Witnesses to Make Disclosure was denied (RC Item 35 minute entry dated September 13).

As was expected, Appellant's Counsel on cross-examination of Edmund Eccleston (RT 20-21) and of Roger Walker (RT 43) tried to attack their specific recollection.

Appellant had the benefit of the Government's case report prior to trial. He did try to talk to some of the witnesses before trial, but as Robert Boyd stated in answer to Appellant's counsel's question:

"Q Were you willing to discuss the case with me?

"A You asked me if I wanted to discuss the case with you, I said I preferred not to." (RT 55, L 16-18)

However, he did not try to talk to all the witnesses:

"Q Do you recall my consulting with you this morning and requesting you to discuss this case with me?

"A No, sir, you did not consult with me." (RT 92, L 12-14)

Here, the Appellant had a list of the Government witnesses to which he is not entitled, and their Jenckes Statute Statements were made available well prior to trial, to which he was not entitled until the witness had testified, 18 U.S.C.A. §3500.

It is respectfully submitted that the Appellant was not entitled to such an order and there was no error in denying it.

3. The Statement in the Government's Opening Statement which was not admitted into evidence was harmless error, if error it was.

Appellant argues there was prejudicial error and grounds for a mistrial because the Government's counsel stated in the opening statement that when the Inspector reached into a panel at the rear of the trunk of the vehicle and felt a sack, he asked Appellant "what's in here" and the Appellant replied "it's ballast."

When Inspector Roger Walker was testifying the following occurred:

"A After I had checked both the front of the car, the front seat and the trunk, I became curious of some unaccountable space between the seat and the trunk, from the trunk I poked at it and jabbed at it and there was resistance. It looked like an empty space. There was a divider there I pulled aside, I reached my hand in, I could not see but I could feel what I felt to be a sack or burlap bag of some kind stuffed with something. Still without having looked at it, I asked Mr. Montano what that might be in that sack and the answer was —

"MR. HIRSH: Pardon me. At this time I renew my objection on the grounds of further indication at this point the situation has changed, no showing of voluntariness or no compliance with the Rule in the Miranda case.

"THE COURT: The objection will be sustained."
(RT 34, L 10-24)

Before releasing this witness on direct examination, the Government's counsel asked to take up a matter of law outside the hearing of the jury. (RT 37, L 3-4) The jury was excused, and then the following occurred:

"THE COURT: Let the record show that the jury is entirely withdrawn from the courtroom, the defendant is present and counsel are present.

"MISS DIAMOS: Your Honor, going back to that statement, I think the Court ruled that a showing would have to be made that it was voluntary.

"THE COURT: Well, I think you have to show he was advised of his rights in addition to its being voluntary.

"MISS DIAMOS: I don't believe any such showing can be made. I am referring to when Mr. Walker recalled when he felt inside that partition and felt the gunny sack, he asked Mr. Montano what it was.

"THE COURT: I say to you frankly that I don't believe it is within Miranda. But I don't think it is going

to make much difference in the case. To be certain you make no mistake, I am not going to let him tell about the answer. That is the basis for my ruling.

"MR. HIRSH: I have two matters, Your Honor, as long as the jury is not present at this time." (RT 38, L 1-19)

After raising objection on the voir dire of the jury, Appellant's counsel then stated:

"MR. HIRSH: I have one other matter, if it please the Court. I would at this time move for a mistrial on the grounds that the United States Attorney in her opening statement stated she was going to show through Customs Inspector Walker that a certain statement was made by Mr. Montano relative to what the bags were doing, the particular place the bags were there to weight the car down.

"THE COURT: Mr. Hirsh, I told you a moment ago I really think that was entirely proper and I could not say the United States Attorney was in bad faith in making that statement during the opening statement. As a matter of fact, I have grave doubt I am giving the United States fair treatment in sustaining. I am merely doing it in bending over backwards in favor of your client. For that reason I will deny the motion for a mistrial." (RT 40, L 4-18)

Appellant's counsel argues that the Government's case was weak and that the opening statement supplied the missing evidence, citing *Jones vs. United States* (D.C. Cir., 1964) as in 330 F.2d 553 but which is 338 F.2d 553.

Appellant was the driver of, and therefore had custody of, the vehicle in which the contraband was found. Approximately 43 pounds of bulk marihuana, and from which some 160 amphetamine tablets were removed from the right arm rest (RT 59-63, L 11).

The inference created by the statute (21 U.S.C.A., §176a) was not overcome by an explanation, such as, that the car was left unattended in Mexico and that in that way someone

had used the car to transport. Perhaps Appellant is arguing there was no evidence of knowledge of the presence of the contraband and that, therefore, the inference would not arise. However, it is respectfully submitted there was not such a lack of evidence as in the Jones case to make the statement in the opening statement prejudicial. Further, it is respectfully submitted the statement was not within the Miranda rule (*Miranda v. Arizona*, 1966, 384 U.S. 436).

It is respectfully submitted there were no grounds for a mistrial.

4. The marihuana exhibits contained marihuana, i.e., the plant, stems and seeds, as well as the leaves, and are cannabis sativa L. as defined in 26 U.S.C.A. 4761.

Title 21 U.S.C.A. §176a provides in part:

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

Title 26 U.S.C.A., §4761, provides in part:

"(2) Marihuana.—The term 'marihuana' means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." (emphasis supplied)

The Government chemist testified she examined the seeds and the leaves (RT 118 and 119, L 21 to 120, L 6).

It is respectfully submitted the marihuana exhibits were properly admitted.

5. There is no basis in law for Defendant's Requested Instruction Number 1.

Defendant's Requested Instruction Number One as set out on page six of Appellant's Opening Brief alleges the Government must prove a "psychotropic offense." There is no basis in law for such an instruction. (Please see argument numbered four immediately preceeding.)

6. The Trial Court did not abuse its discretion in conducting the voir dire of the panel.

Rule 24(a), Federal Rules of Criminal Procedures, Title 18, U.S.C.A. provides:

"(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

The record reveals as follows:

"MR. HIRSH: Ladies and gentlemen, I wonder if I could get a show of hands or people that have sat on prior criminal cases. Mr. Larue, can you hear me all right?

"MR. LARUE: Yes.

"MR. HIRSH: All right, sir. You have had prior jury duty on a criminal case?

"MR. LARUE: Yes.

"MR. HIRSH: What kind of case was that?

"THE COURT: Mr. Hirsh, we are concerned with this case and there is no point in going into what other cases

he tried. He told you he sat on criminal cases and that is sufficient in order for you to proceed with your voir dire." (RT 15, L 6-17)

He then asks to make a record on it. At the first recess he alleges it would be an undue burden on the defense to search through files to determine previous jury duty and their verdict (RT 39, L 8-13). Appellant's Counsel would subject a juror to an itemization of the previous trial the juror has sat on and the verdict rendered. How this, i.e., the Court's not permitting it, constitutes an abuse of discretion is beyond this counsel's comprehension. The Court properly exercised its sound discretion.

In the Trial Court, each counsel is furnished with the entire jury panel which sets out the age, address, spouses, jobs and children, if any, and also if prior to the present panel they have or have not had jury experience. (This is not in the record, but is offered in explanation of the lack of these type of questions in the voir dire of the trial panel, See RT 7, L 22 to 17, L 10.)

Appellant's counsel alleges at page 32 of Appellant's Opening Brief:

"The worst vice of not allowing appellant to ask this question was the fact that the United States Attorney prosecutes two to three cases weekly in front of the same jury panel for a six month period and is completely familiar with each and every juror and with each case that juror has sat on during the time that the juror has been on the panel."

What this means is not clear; it could cast a slur on the ethics of Government's counsel or it could mean the Government's counsel strikes jurors who have rendered not guilty verdicts. If the former is meant, it is respectfully submitted there is no basis in fact; if the latter is meant; six preemptory

challenges allowed the Government would not have been enough.

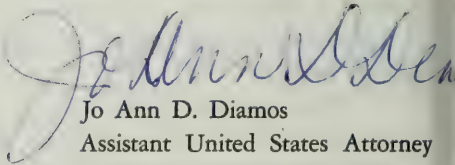
It is respectfully submitted the Trial Court exercised its discretion soundly. *Johnson v. United States* (9th Cir., 1959) 270 F.2d 721 at page 724, Cert. den. 362 U.S. 937, 4 L.Ed. 2d 751, 80 S.Ct. 759.

VI. CONCLUSION

It is respectfully submitted that the evidence was properly submitted and admitted and there was no prejudice to the actual rights of the Appellant.

Respectfully submitted,

Edward E. Davis
United States Attorney
For the District of Arizona



Jo Ann D. Damos
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



Jo Ann D. Damos
Assistant United States Attorney

Three copies of the Brief of Appellee mailed this
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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM GEORGE DECK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,420

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

FILED

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IN THE
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UNITED STATES OF AMERICA,

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On Appeal from the Judgment of
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BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

The Government accepts and adopts the Jurisdictional Statement of Facts of Appellant with the following addition: At trial Appellant had retained counsel, who was appointed for the appeal under the Federal Criminal Justice Act (18 U.S.C.A., §3006A).

(Hereinafter the Transcript of the Record, Volume I will be referred to as "RC"; the Reporter's Transcript of the testimony at trial will be referred to as "RT," the number following will refer to the page, and the number following "L" will refer to the line; the Appellant will be referred to as "Deck" or "Appellant.")

II.

STATEMENT OF FACTS

(The Government accepts and adopts the Appellant's Statement of Facts but is repeating hereinafter in order to add citations and to correct his citations to the transcript and to expand, somewhat, the evidence received at trial. The citations given by Appellant at the beginning were of a hearing out of the presence of the jury.)

On January 8, 1967, at approximately 4:30 in the afternoon, Appellant and another crossed from Mexico into the United States at the Grand Avenue Port of Entry in Nogales, Arizona (RT 10, L 4-18). At that time, Appellant was a passenger in a car driven by Louis Ralph Montano who was directed to a secondary station at the Point of Entry because it appeared that the Appellant and the driver of the vehicle had come from Mazatlan, i.e., the interior of Mexico (RT 10, L 4-18; 23-24). Roger Walker, a customs inspector on duty at the time at the secondary inspection area of the Nogales Port of Entry, discovered a sack filled with vegetable matter in the back part of the car being driven by Louis Ralph Montano (RT 23-24; 27-28). On Deck's person was found a pack of cigarette papers (RT 39, L 14-23). Also found on Deck were two orange tablets (RT 40). A short time thereafter certain capsules or tablets were found within the same automobile (RT 40, L 9-22). The vegetable substance found in the bag and on the cigarette papers was later identified by

Miss Roselyn Ereneta, a chemist employed by the custom services, as being marijuana and the tablets or capsules as amphetamine (RT 59-61). The substances identified as marijuana in the bag and in the cigarette papers and amphetamine in the arm rest and on Deck were obtained from the vehicle in question without a search warrant. (See RC that no search warrant is in the record.) Deck was not driving the vehicle in question. The Court admitted a statement made by him to Roger Walker to the effect that "the stuff we are bringing is a lot better for you than the stuff you are smoking" (RT 29-30). This statement was admitted by the Trial Court after a hearing out of the presence of the jury (RT 12-22) and with a cautionary instruction to the jury at the time of its receipt into evidence (RT 30, L 4-22).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The Trial Court did not err in denying Appellant's Motion to Suppress.
2. The Trial Court did not err in denying Appellant's Motion to Order Government witnesses to make disclosure to Appellant.
3. The Trial Court did not err in refusing Appellant's requested instruction number 1.
4. The Trial Court did not err in admitting the statement made by Appellant.
5. The Trial Court did not err in admitting the cigarette (Zig-Zag) papers containing the tiny leaf fragments of marijuana.
6. The Trial Court did not err in denying a motion for judgment of acquittal.

IV.

SUMMARY OF ARGUMENT

1. A search of a vehicle at a port-of-entry whose occupants stated they came from Mazatlan, Mexico, i.e., the interior of Mexico, was a border search.

2. The Motion to Order Government Witnesses to Make Disclosure was linked to a Motion to Continue Trial and was properly refused in view of the Government's Response in its Opposition to the Motions.

3. There is no basis in law for Defendant's Requested Instruction Number 1.

4. The statement of the Appellant was made after being placed under arrest, and advised as to his rights, and was not made in response to any question.

5. The reliability of the identification of marijuana leaf fragments in the cigarette (Zig-Zag) papers by the Government's chemist was for the jury, and the weight to be given this evidence was for the jury.

6. There was more than sufficient evidence to submit the case to the jury.

V.

ARGUMENT

1. A search of a vehicle at a port-of-entry whose occupants stated they came from Mazatlan, Mexico, i.e., the interior of Mexico, was a border search.

The Motion to Suppress was submitted on stipulated facts, but as was brought out by stipulation at trial, Edmund Eccleston who saw the car Appellant was riding in approach the port-of-entry from Mexico:

"A I asked them their citizenship and asked them where they were coming from and asked them if they brought any merchandise with them from Mexico.

"Q What was answered by Mr. Montano?

"A Both declared to be U.S. citizens and they were coming from Mazatlan and were bringing no merchandise at all.

"Q What did you do?

"A Well, they were coming from Mexico, the interior, which is south of the town of Nogales, Sonora, we refer all cars to secondary inspection coming from the interior. So then I informed them to go to the secondary for further inspection and announced on the public address system that the car, told them it was coming down, which we do with all cars coming from the interior.

"Q Do you have a code or signal for that?

"A Yes, we do.

"Q What is it?

"A A car coming from the interior is called 101.

"Q Did Mr. Montano say anything after you told him he was going to secondary?

"MR. HIRSH: Pardon me. Let me again object to this on the grounds of insufficient foundation by the Government for any statements by this defendant.

"THE COURT: No. This is merely on his entry into the United States. The objection is overruled.

"A Mr. Montano wanted to continue on, he had trouble with the transmission of his car and didn't want to stop because he was afraid he couldn't get his car going again. I told him he would have to go on down, that it was for further inspection.

"Q (By Miss Diamos) And did they drive toward secondary?

"A Yes, they did." (RT 10, L 4-23)

When the car's luggage was searched in secondary, the Inspector noticed a space between the rear seat and the luggage compartment; he jabbed at it and there was resistance. He pulled the divider inside and felt a bag there (RT 26-27).

Appellant, citing from *Marsh v. United States*, (5th Cir., 1965 344 F.2d 317, at page 324 states: "Border searches are, of course, not exempt from the constitutional test of reasonableness."

The statutory basis for a border search is 19 U.S.C.A. 482. It is:

"482. SEARCH OF VEHICLES AND PERSON

"Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. §3061."

The historical note gives the derivation of 19 U.S.C.A. 482 as Act, July 18, 1866 c. 201 §3, 14 Stat. 178.

The United States Supreme Court in *Boyd v. United States*, 116 U.S. 616, 29 L.Ed. 746, 6 Sup. Ct. 524, traced the history of the third section of Chapter 201. It stated that statutes

provided for seizure of forfeited goods and had been authorized for two centuries prior to the adoption of the U.S. Constitution and since the first statute passed by Congress to regulate the collection of duties contained provisions to this effect (Act of July 31, 1789, 1 Stat. at Large 29, 43, Chap. 5) was passed by the same Congress which proposed for adoption the first amendments to the Constitution, ". . . it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the (Fourth) Amendment," *Boyd v. United States*, supra, at page 623.

This Court in *Murgia vs. United States*, (9th Cir., 1960) 285 F.2d 14, at page 17, reiterated this principle. "(The) searches of persons entering the United States from a foreign country are in a separate category from searches generally** (and) 'are totally different things from a search for and seizure of a man's private books and papers***.'"

Thus the principle has long been recognized, in fact, from the inception of the Fourth and Fifth Amendments that border searches are in a separate category.

This Court in *Murgia vs. United States*, supra, quoted with approval from *Landau vs. United States Attorney for Southern District*, 2 Cir., 1936, 82 F.2d 285, which stated the broad effect of the border search rule. The court therein stated at page 286:

"As early as 1799, the baggage of one entering the country was subject to inspection (1 Stat. 662). The necessity of enforcing the customs laws has always restricted the rights of privacy of those engaged in crossing the international boundary. See *Carroll v. United States*, 267, U.S. 132, 154, 45 S. Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790. *Neither a warrant nor an arrest is needed to authorize a search in these circumstances.* In the instant case, there was no disturbance of the appellant, his residence, or his effects

after a completed entry. It was to these evils that the Fourth Amendment was directed. *Boyd vs. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L.Ed. 746. It has been said 'Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.' See *United States v. Kirschenblatt*, 16 F. (2d) 202, 203, 51 A.L.R. 416 (C.C.A.2). *Although inspection of the person and baggage upon entry may be carried so far, or be so conducted, as to constitute an unreasonable search*, it is clear that such is not this case." (emphasis supplied)

Clearly, then whether there is in fact an arrest or not, the test is reasonableness which is a strict test, to quote from *Blackford vs. United States* (9th Cir., 1957) 247 F.2d 745, at page 750:

"Thus, we must apply the test of reasonableness to the conduct of the officers in the case at bar. This is a stricter test than (sic.) that applied to state proceedings under the Due Process Clause of the Fourteenth Amendment in *Rochin and Breithaupt*. The test there is whether the alleged activity of law enforcement officers in obtaining the questioned evidence fell short of civilized standards of decency and fair play. There may be, we conceive, conduct which, while unreasonable, is not so unconscionable that it 'shocks the conscience' or 'offend[s] a sense of justice.' *Rochin*, 342 U.S. at page 172, 72 S.Ct. at page 208. On the other hand, if conduct is reasonable, it must perforce satisfy Due Process requirements. Accordingly, if the actions here questioned were reasonable, they did not constitute a violation of either the Fourth or Fifth Amendments."

Title 19 U.S.C.A., §1461, provides:

"All merchandise and baggage imported or brought in from any contiguous country, except as otherwise provided by law or by regulations of the Secretary of the Treasury, shall be unladen in the presence of and be inspected by a customs officer at the first port of entry at

which the same shall arrive; and such officer may require the owner, or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise, or other container, or of any closed vehicle, to open the same for inspection, or to furnish a key or other means for opening the same. June 17, 1930, c. 497, Title IV, §461, 46 Stat. 717."

Thus, when the Inspector found an unaccounted for space, and pressed the panel and found resistance, surely it cannot be argued that, when the Inspector put his arm into this space and found a sack, the search was unreasonable.

2. The motion to order Government witnesses to make disclosure was linked to a motion to continue trial and was properly refused in view of the Government's response in its opposition to the motions.

Appellant filed a "Motion for Continuance and Order Ordering Government's Witnesses to Make Disclosure to Defendants" two days before the second time a trial was scheduled. (RC Item 10)

As was stated by the Government in its response opposing the Motion to Continue:

"This Response of Government and Memorandum in Opposition to Defendants' Motion to Continue, by Edward E. Davis, United States Attorney for the District of Arizona, by Jo Ann D. Diamos, Assistant United States Attorney, is submitted in response to Defendants' Motion for Order directing Government's witnesses to talk to defense attorneys and for continuance of the trial date.

"The records of this case show that this case was set for trial March 28, 1967. Defense attorneys then requested a continuance and this case was then set for trial on September 14, 1967.

"Some eight months after their arraignment Defendants filed a Motion to Suppress. Now, some two days before

the date set for trial, again the Defendants are seeking a continuance. Counsel admit that Government's counsel made its file available to defense counsel. They not only had the probable list of Government witnesses, but a summary of their testimony. Now defense counsel seek an order compelling Government witnesses to talk to defense counsel. What the Court wishes to do—this aspect of the Motion lies in its sound discretion. However, it is respectfully submitted, the motion for continuance becomes an abuse by defendants' counsel. Another continuance would only weaken the Government's case by permitting the trial to be put off again.

"As the Court knows, the Motion to Suppress was submitted on stipulated facts, i.e., the two defendants sought entry into the United States from Mexico at the Grand Avenue Port of Entry, they were referred to the secondary inspection area because they stated they came from the Interior, and here the contraband was found. The facts therefore are relatively very simple.

"What defense counsel seek is to have the Government be compelled to lay its entire case before Defendants, to have the matter then tried at some unknown date in the future and then face the probable argument of how can Government witnesses recall facts so long after the event, i.e., January, 1967 to trial date.

"It is respectfully submitted, that in view of both defense counsels' previous trial experience in this Court, the Motion to Continue should be denied, and the Government prays the Court exercise its sound discretion in acting on the Motion to compel the Government's witnesses to talk to defense counsel." (RC Item 11)

The Court denied the Motion to Continue and Order Ordering Government's Witnesses to Make Disclosure was denied (RC Item 35, minute entry dated September 13).

As was expected, Appellant's Counsel on cross-examination of Roger Walker (RT 31-32) and of Everett Turner (RT 45-51) and of James B. Anderson (RT 42), tried to attack their specific recollection.

Appellant had the benefit of the Government's case report prior to trial and the Appellant had a list of the Government witnesses to which he is not entitled, and their Jenckes Statute Statements were made available well prior to trial, to which he was not entitled until the witness had testified, 18 U.S.C.A., §3500.

It is respectfully submitted that the Appellant was not entitled to such an order and there was no error in denying it.

3. There is no basis in law for Defendant's Requested Instruction Number 1.

Defendant's Requested Instruction Number One as set out on page 5 of Appellant's Opening Brief instructs the Government must prove a "psychotropic offense." There is no basis in law for such an instruction.

Title 21 U.S.C.A. §176a provides in part:

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

Title 26 U.S.C.A., §4761, provides in part:

"(2) Marihuana.—The term 'marihuana' *means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.*" (emphasis supplied)

The Government chemist testified she examined the seeds and the leaves (RT 118 and 119, L 21 to 120, L 6).

It is respectfully submitted Defendant's Requested Instruction Number One was properly refused.

4. The statement of the Appellant was made after being placed under arrest and was advised as to his rights, and was not made in response to any question.

Appellant at pages 23 to 24 presumes to suggest the state of mind of the Trial Court, Chief Judge James A. Walsh.

He argues that the Court was distinguishing between confessions and admissions. Appellant's Counsel ignores the record.

A hearing, out of the presence of the jury before any testimony was offered, was held at the time of the first recess in order to not inconvenience the jury (RT 72, L 6-11).

The hearing consisted of the testimony of a Customs Inspector and a Customs Agent (RT 12-21). The Appellant did not offer testimony to controvert their testimony (RT 21, L 25 to 22, L 2).

Thus, the requirement of the Trial Court first ruling on the voluntariness of the statement was complied with. *Jackson v. Denno* (1964) 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed 2d 908.

Miranda v. Arizona (1966) 384 U.S. 436, 16 L.Ed 2d 694, 86 S.Ct. 1602, sets out the requirements for the Government to establish the voluntariness of an in custody *interrogation*.

In the instant case there was no interrogation. The Appellant had been placed under arrest for smuggling marijuana and was advised by Customs Agent Anderson that he did not have to make any statement, and those he did make could be used against him in Court, that they were entitled to the presence of an attorney right then and there, and that if he could not afford an attorney, the Government would hire one for him (RT 18, L 17 to 19, L 3). Agent Anderson then left with co-defendant Montano and Customs Inspector Roger Walker remained with Deck (RT 16, L 6-10).

Walker lit a filtered cigarette and Deck told him the statement: "The stuff we are bringing is a lot better for you than the stuff you are smoking." (RT 29, L 24 to 30, L 1)

The Court ruled:

"THE COURT: In the matter of the statement, the Court will permit the statement to be introduced on the basis, while the advice as to the legal rights is not too thorough, this appears to be not a statement as a result of any questioning; it's a voluntary statement. As I understand it, the witness testified that when he lit a cigarette, the defendant volunteered that statement; and it is clear that before that time, the defendant had been advised that he didn't have to make any statement, and that anything he did say could be used against him in court. So it will be admitted on that basis." (RT 22, L 6-15)

At the time of the reception of the statement before the jury (RT 29, L 24 to 30, L 1), the Court instructed the jury:

"THE COURT: Mr. Walker, wait a moment. Members of the jury, the witness has testified to a statement made by Mr. Deck, and the rule in all cases is that any admission or incriminatory statement which is claimed to have been made by an accused person outside of court is to be received with caution and weighed with great care; and I want to instruct you particularly, with reference to the statement, that you have the determination first as to whether or not you believe the statement was made by Mr. Deck, but even if you—of course, if you find that it wasn't made, you will just disregard the testimony. On the other hand, if you do find that the statement was made by Mr. Deck, as the witness has testified, then you must determine whether Mr. Deck made that statement voluntarily, that is knowing that he was not required to say anything and knowing that if he did say anything it could be used against him. Unless you find that it was made voluntarily—in other words, if it was made with knowledge that he did not have to say anything; and if he didn't make it with understanding, you can disregard the statement." (RT 30, L 4-24)

The Trial Court again during its instructions to the Jury at the close of all the evidence instructed them again, as follows:

"All evidence relating to any admission or incriminatory statement claimed to have been made by the defendant outside court should be considered with caution and weighed with great care. I am going to repeat the admonition that I gave to you earlier with respect to the statement the witness Walker testified to, the statement of the defendant to the effect that what we have or what we have been bringing, or something similar, would be better for you than that, when the witness is lighting a cigarette. If you do not find that that statement was actually made by the defendant, of course, you will give it no consideration. On the other hand, if you find that the statement was made by the defendant as Mr. Walker testified, then you will consider whether the statement was voluntary, whether the defendant knew at the time he made the statement that he was not required to make any statement and if he did make it, it could be used against him. Unless you find it was so voluntary and unless you find he did know that he was not required to make any statement and knew that it could be used against him if he made it, you will disregard the statement." (RT 81, L 20 to 82, L 14)

It is respectfully submitted the Appellant Deck, having been warned not to make any statements and that if he did they could be used against him (as well as the right to any attorney, etc.), did make a statement not in response to any question and the statement was therefore voluntarily made.

5. The reliability of the identification of marijuana leaf fragments in the cigarette papers by the Government's chemist was for the jury and the weight to be given this evidence was for the jury.

Appellant at trial objected to the identification of the marijuana leaf fragments as being too small a sample. (RT 56, L 22 to 57, L 4) This was not argued on appeal and will

therefore not be argued. Suffice it to say, the Chemist identified it and gave her reasons for her opinion (RT 62, L 15 to 63, L 14).

He objected further that it was offered as evidence of misconduct. (RT 57, L 4-9)

Where Appellant got this notion is not apparent. It was offered as circumstantial evidence of knowledge and constructive possession of the marijuana.

On appeal, Appellant argues it was offered to show "that the Appellant smoked some marijuana when he was down in Mexico. The jury is then asked to speculate that if he smoked marijuana in Mexico, he probably also bought some." (Appellant's Opening Brief, p. 24, third full paragraph, third sentence.)

He then gets to the crux of his argument, that if these two items of evidence were excluded, the marijuana leaf fragments and the statement, this would be a passenger case, and thus not sufficient evidence for the Court to submit the matter to the jury.

It is respectfully submitted the testimony of the chemist on the marijuana leaf fragments in Government's Exhibit 6 was properly admitted.

6. There was more than sufficient evidence to submit the case to the jury.

Appellant cites *Arellanes v. United States* (9th Cir., 1962) 302 F.2d 603, in support of his position attacking the sufficiency of the evidence. Admittedly, without both of these items of evidence, the statement and the marijuana leaf fragments in the cigarette papers found in his pants pocket and the two pills found in his pants pocket (which appeared to be identical to one of the three types of amphetamine tablets found in the arm rest of the car), there would not have been

sufficient evidence. The car had California license plates (RT 10, L 14-15), and they both were coming from Mazatlan, thus there was some evidence of a joint venture.

However, the evidence was properly admitted. The two pills in his pants pocket, and the cigarette papers containing marijuana leaf fragments were circumstantial evidence of knowledge *and* constructive possessions.

It is respectfully submitted there was sufficient evidence to submit the case to the jury and upon which to find the Appellant guilty beyond a reasonable doubt.

VI. CONCLUSION

The evidence was properly received and there was sufficient evidence upon which a jury could find Appellant guilty beyond a reasonable doubt.

Respectfully submitted,

Edward E. Davis

United States Attorney



Jo Ann D. Damos

Assistant United States Attorney

Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



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Three copies of the Brief of Appellee mailed this *26th*
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

No. 22422 ✓

MAR 11 1968

WM. B. LUCK CLERK

MARY F. CUNNINGHAM, APPELLANT

v.

LITTON INDUSTRIES, A CALIFORNIA
CORPORATION, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF AND APPENDIX OF THE UNITED STATES
AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE

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MAR 13 1968

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INTEREST OF THE UNITED STATES

This appeal presents an important question concerning the time limitation for bringing suit under section 706(e) of Title VII of the Civil Rights Act of 1964. [42 U.S.C. 2000e -5(e).] The question is whether an alleged victim of employment discrimination who brought suit within 30 days of being notified by the Equal Employment Opportunity Commission of her right to bring suit, but more than 180 days from the date of the claimed act of discrimination, is barred under section 706(e).

The Equal Employment Opportunity Commission is the federal agency charged with the administration of the statutory scheme of which section 706(e) is a part, and the Attorney General has independent responsibilities with respect to that section. For these reasons the United States has a direct and immediate interest in the proper interpretation of section 706(e).

STATEMENT

The plaintiff, Mrs. Cunningham, was employed by the defendant, Litton Industries, in 1961 as publications production technical coordinator (TR 3-4). She was subsequently promoted to the position of publications quality control specialist in which job she received good recommendations and regular salary increases (TR 4). In May, 1965, and again in April, 1966, there were openings in the company in the higher position of publications quality coordinator (TR 4). Mrs. Cunningham was in direct line for these jobs but was denied the promotion solely because of her sex (TR 4). Male employees were appointed who were not as qualified as Mrs. Cunningham (TR 4).

In April, 1966, Mrs. Cunningham protested the appointment and her grievance resulted in it being rescinded temporarily while the male appointee received on-the-job training (TR 5).

In July, 1966, ^{1/} the defendant reappointed the male employee to the position sought by the plaintiff but the paper work was not finally completed until October 1966.

On September 14, 1966, Mrs. Cunningham filed a complaint with the Equal Employment Opportunity Commission, hereinafter referred to as EEOC, claiming she had been denied the promotion because of her sex. ^{2/}

On March 30, 1967, EEOC, after investigation, found "reasonable cause to believe that the [defendant] violated Title VII of the Civil Rights Act of 1964 by discriminating against the [plaintiff] because of her sex, by failing to promote her to "publications quality

1/ The record does not disclose the date on which the male appointee was reappointed or the date on which Mrs. Cunningham filed her complaint with EEOC. The decision of EEOC, which is judicially noticeable under section 705(a)(c), shows that the male was reappointed in July, 1966, and the complainant filed with EEOC September 14, 1966 (Appendix p. 1, 2). The Court below assumes that the complaint was filed as late as October 7, 1966 (TR 21). In any event, there is no dispute that her complaint to EEOC was timely.

2/ Appendix p. 1.

control coordinator'" (TR 5-6). Thereafter, under section 706(a) of Title VII, EEOC sought without success to conciliate and achieve voluntary compliance by Litton Industries (TR 6).

On June 7, 1967, EEOC formally notified Mrs. Cunningham of its inability to obtain voluntary compliance and of her right to bring suit under section 706(e) within 30 days (TR 6).

On July 6, 1967, within the 30-day period, Mrs. Cunningham filed this action alleging she had been discriminated against on account of her sex by Litton Industries in violation of Title VII of the Civil Rights Act of 1964 (TR 21).

On September 27, 1967, the District Court dismissed Mrs. Cunningham's complaint without leave to amend (TR 21). The Court held that the suit by Mrs. Cunningham was barred under section 706(e) of the Act because it was filed more than 180* days from the date of the claimed discrimination (TR 21-22). The Court assumed that the date of the claimed discrimination could have been October 7, 1966 (TR 21).

Notice of appeal to this court was filed on October 27, 1967 (TR 23-24).

*The Court arrived at 180 day figure by adding 90 days allowed for filing the charge with EEOC, 60 days allowed for EEOC's administration of the case and, the 30-day notice period.

SPECIFICATION OF ERROR

The District Court erroneously held that a private suit under section 706(e), Title VII, Civil Rights Act of 1964 [42 U.S.C. 2000e-5(e)], filed within 30 days after notice by the Equal Employment Opportunity Commission of its inability to obtain voluntary compliance, but more than "180 days from the date of the claimed act of discrimination" was barred by section 706(e).

ARGUMENT

I. A suit under 706(e) is not barred where a complaint has been properly filed within 90 days with EEOC and such suit was filed within 30 days after notification by EEOC of its failure to conciliate.

A. The Statutory Scheme.

Title VII of the Civil Rights Act of 1964 established a private cause of action to redress employment discriminations. It also set up an administrative mechanism whereby the EEOC would have the opportunity to conciliate and obtain voluntary compliance prior to the filing of private litigation.

Section 706(a), (d), and (e) of the Act establish the mechanics of implementing the policies of the private right of action, 3/ and the administrative efforts for conciliation.

3/ The pertinent provisions of the statute are:

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member

(continued on next page)

Under the Act, the private litigant must afford the Equal Employment Opportunity Commission the chance to conciliate and obtain voluntary compliance. The victim of the alleged discrimination or potential litigant, must:

- a. File a written charge with the Equal Employment Opportunity Commission within 90 days of the alleged unlawful employment practice.

3/ (continued from preceding page)

of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the 'respondent') with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion....

* * * *

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred,

b. File suit within 30 days after notification by the Equal Employment Opportunity Commission of its failure to conciliate the dispute. 4/

3/ (continued from preceding page)

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

4/ This procedure relates only to situations where the Commission has found reasonable cause that a violation of Title VII exists. We are not concerned with the litigants' right to sue and the time limitations for bringing suit if the Commission finds that no reasonable cause exists that there is a violation.

EEOC under this statutory scheme is directed to investigate the charge to ascertain whether there is reasonable cause to believe that the charge is true and, if so, to endeavor to eliminate the unlawful employment practice by conciliation, and if unsuccessful, to notify the victim of its failure to conciliate the dispute. The statute places an obligation on the Commission to accomplish this within 30 days, or within 60 days if it extends the time.

B. Policy and Legislative History.

In our view, the District Court's decision was based on an erroneous construction ^{5/} of section 706(e).

What the District Court did was to add up each of the time limitations of section 706(d)(e) (90 days for filing the complaint with the EEOC, 60 days for finding reasonable cause and conciliation, and 30 days for filing suit) and ruled that under the statute suit must be filed within 180 days of the alleged unlawful employment practice.

^{5/} Implied in this premise, in our view, is the additional erroneous assumption that the statute imposes a mandatory obligation on the Commission to accomplish its function within a maximum of 60 days.

To adopt the District Court's construction of the time limitations of section 706(e) would place a litigant in the anomalous position of being penalized for a delay for which EEOC is solely responsible and over which he has no control. Ward v. Firestone Tire and Rubber Co., 260 F. Supp. 579, 580 (W.D. Tenn. 1966). Indeed, under this construction of section 706(e), Mrs. Cunningham, on the facts of this case, would be barred from suit at the very time EEOC first found reasonable cause to believe that her complaint was true, 6/ a clearly untenable result.

Such a construction, we contend, runs contrary to the intent of Congress. This intent is evidenced in the Dirksen-Mansfield compromise in the Senate which left court enforcement of violations of Title VII (other than pattern and practice violations) to private actions brought by the aggrieved individuals. The bill, which initially passed the House authorized EEOC to bring a civil

6/ For, whether one views the action of discrimination as occurring in July or October, 1966, the Commission's finding of reasonable cause on March 30, 1967, occurred more than 180 days after such act of discrimination.

it to stop any unlawful employment practice if efforts
voluntary compliance failed. It seems clear that this
change indicates a legislative preference for a division of
responsibility in the mechanism for enforcing Title VII,
with EEOC responsible for conciliation and the aggrieved
party responsible for court enforcement. To allow problems
within the statutory province of EEOC over which the liti-
gant was given no responsibility by Congress to govern his
right of suit, would run contrary to the intent of Congress.^{7/}

Moreover, the decision of the District Court would
have the further effect of thwarting the intent of Congress
providing a threshold scheme of attempting to solve dis-
crimination disputes through conciliation. For to require
that suit must be filed within 180 days after the alleged
act of discrimination without regard to the status of EEOC's
efforts would, as we see it, diminish the possibility of
compliance through private informal conference and concili-
ation. Such a rule is particularly troublesome in view of
the already burdensome case load of EEOC, which inevitably
has resulted in an inability to complete the conciliation
process within 60 days in every case, Evenson v. Northwest
Airlines, 268 F.Supp. 29 (E.D. Va. 1967). The Commission
is well aware of this problem when it amended its regulations
read:

See colloquy between Senator Douglas and Senator Pastore,
110 Cong. Rec. 13695, June 17, 1964.

(a) The time for processing all cases is extended to 60 days except insofar as proceedings may be earlier terminated pursuant to §1601.19.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Commission shall not issue a notice pursuant to §1601.25 prior to a determination under §1601.19 or, where reasonable cause has been found, prior to efforts at conciliation with respondent, except that the charging party or the respondent 8/ may upon the expiration of 60 days after the filing of the charge or at any time thereafter, demand in writing that such notice issue, and the Commission shall promptly issue such notice to all parties. 9/

The regulation 10/ clearly evidences an intent to fulfill the statutory scheme outlined above by allowing conciliation attempts to continue as long as they may appear fruitful while giving either party the power to precipitate the final Commission action necessary as a prerequisite for suit. Thus, final control over the institution of a suit is left to the private parties and not to the Commission, as was the intent of Congress.

8/ It should be noted that Litton Industries at no time demanded that such notice be issued.

9/ 29 C.F.R., §1601.25a (Jan. 1, 1967).

10/ See Also the Digest of EEOC Legal Interpretations, BNA 401.1020G (March 30, 1967).

C. Cases:

1. Section 706 cases

Federal courts have unanimously recognized that a private party fulfills the prerequisites imposed upon him by the statutory scheme when he files his charge with EEOC within 90 days of the alleged unlawful practice and files his suit within 30 days after notification by EEOC of its failure to conciliate. Anthony v. Brooks, 12 RRIR 1419, 1420; 65 LRFM 3074 (N.D. Ga. 1967); Quarles v. Phillin Morris, 271 F.Supp. 842 (E.D. Va. 1967); Evenson v. Northwest Airlines, 268 F. Supp. 29 (E.D. Va. 1967); Bowe v. Colgate-Palmolive Company, 272 F. Supp. 332 (S.D. Ind. 1967); Moody v. Albemarle Paper Company, 271 F. Supp. 27 (E.D. N.C. 1967); Stebbins v. Nationwide Mutual Insurance Company, 382 F.2d 267 (C.A. 4, 1967). Cf. Choate v. Caterpillar Tractor Co., 274 F. Supp. 776 (S.D. Ill. 1967). These courts have further recognized that in order to carry out the dual enforcement system intended by Congress, the time limitations placed upon EEOC must be viewed as directory rather than mandatory, at least insofar as it would affect a private party's right to sue.

In Mondy v. Crown Zellerbach Corporation, et al, 271 F.Supp. 258, 261 (E.D. La. 1967), the plaintiff filed his complaint with EEOC within the ninety-day period of limitation, but the notification from EEOC of determination of conciliation did not issue until more than

five months after the charge was filed. Plaintiff sued within thirty days thereafter and defendants moved to dismiss on the ground that the suit was barred by the time provisions of section 706(e), thus presenting precisely the same question decided by the Court below in the present case. The District Court held in Mandy:

The difficulty with the defendants' argument is that it places any person wishing to sue under Title VII in an impossible position. If such a party tried to sue within the ninety day period without first receiving the statutory notice, he would be not with the objection that he was suing prematurely, since 42 U.S.C.A. §2000e-5(e) says that he may bring a civil action after being notified by the Commission of its failure to obtain voluntary compliance. (Emphasis added).

See Also Dent v. St. Louis-San Francisco Railway Company, 265 F. Supp. 56, 58 (N.D. Ala. 1967); Mickel v. South Carolina State Employment Service, 377 F. 2d 239 (C.A. 4, 1967). 11/

11/ The District Court's reliance on Hall v. Werthan Bag Corporation, 251 F. Supp. 184 (M.D. Tenn. 1966), is misplaced. There the Court simply held that an intervenor who had not pursued his administrative remedies under section 706(e) was not entitled to relief in the form of back pay or reinstatement. The issue before this Court is inapposite to the one represented in Hall.

2. Statute of limitations cases in general

It is well settled that a litigant's time for instituting an action, when the right to sue is contingent upon notice from a Federal agency, does not begin to run while the litigant awaits such notification. In Crown Coat Front Co. v. United States, 386 U.S. 503, 514 (1967), the Supreme Court stated in relation to a dispute under the Wunderlich Act, 28 U.S.C. 1346, and the applicable statute of limitations, 28 U.S.C. 2401(a), that:

To hold that the six-year time period runs from the completion of the contract, as the Government insists, would have unfortunate impact. The contractor is compelled to resort to administrative proceedings which may be protracted and which may last not only beyond the completion of the contract but continue for more than six years thereafter. If the time bar starts running from the completion date, the contractor could thus be barred from the courts by the time his administrative appeal is finally decided. This would be true whether he wins or loses before the board of appeals. Even if he prevailed there and was granted the equitable adjustment he sought, the Government would be immune from suit to enforce the award if more than six years had passed since the completion of the contract. This is not an appealing result, nor, in our view, one that Congress intended.

See Northern Metal Co. v. United States, 350 F.2d 833, 38-839 (C.A. 3, 1965), which held that a statute of limitations was tolled with respect to an action under the Suits in Admiralty Act during the pendency of required administrative action before contracting officers and the Armed Service Board of Contract Appeals. See also United Contractors v. United States, 368 F.2d 585, 593-594 (Ct. of Cl. 1966); Nager Electric Company, Inc. v. United States, 368 F.2d 847, 855, 865 (Ct. of Cl. 1966); N.V. Philips' Gloeilampenfabrieken v. A.E.C., 316 F.2d 401, 406 (D.C. Cir. 1963). Cf. Steel Improvement & Forge Co. v. United States, 355 F.2d 627, 630-631 (Ct. of Cl. 1966).

Moreover, our construction of the time limitations contained in section 706(e) will not subject employers to the burden of having to defend stale claims after records have been destroyed and witnesses' memories have dimmed. Under the Commission's regulations [29 C.F.R. §1601.25a, Jan. 1, 1967, *supra*], either party may demand that a notice of failure to conciliate be issued at any time after 60 days have elapsed from the date the charge was filed with the Commission. Hence, each party has the option of permitting the conciliation efforts to continue or, alternatively, of requiring the statutory notice to issue, thereby insuring that any litigation will be begun within 30 days.

The facts of the present case show that Litton has not been prejudiced by the fact that plaintiff's suit was

not instituted within the 180-day period the District Court deemed to be the period of limitations. The March 10, 1967, decision of EEOC^{12/} indicates that service of the charge on Litton occurred on October 4, 1966. Thereafter, the company was aware that Mrs. Cunningham was actively pursuing her Title VII remedy and it had an opportunity to prepare any proof it desired to use to rebut the charge. See Burnett v. New York Central Railroad Co., 380 U.S. 424 (1965).

. Summary

In summary, our view of the statute is supported by: (1) the statutory language and the enforcement scheme contained therein; (2) the underlying policy and legislative history of Title VII; (3) EEOC's own regulations implementing Section 706(e); (4) the unanimous authority of the cases holding that notification by EEOC of its inability to obtain voluntary compliance is a prerequisite to suit and that the time limitations placed upon EEOC are directory rather than mandatory; and (5) the general law relating to statutes of limitation as applied to the facts of this case.

/ Appendix, p. 1.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the District Court should be reversed and remanded to the District Court for a trial on the merits.

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit (and have inquired of the Clerk's Office thereof, for the purpose of ascertaining the propriety of filing a brief in this case which is not printed and have received an affirmative response to such inquiry) and that, in my opinion, the foregoing brief is in full compliance with those rules.


ALVIN HIRSEHN
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A P P E N D I X

C O P Y

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Mary F. Cunningham
Charging Party

Case No. 6-12-9113
LA 6-9-15

vs.

Litton Industries
Guidance and Control Systems Division
Woodland Hills, California
Respondent

Date of filing: September 14, 1966
Date of service of charge: October 4, 1966

DECISION

SUMMARY OF CHARGE

The Charging Party alleges discrimination on the basis of her sex in that the Respondent Company promoted two men, successively, to jobs as Publications Quality Control Coordinators when she should have been promoted to this job classification on the basis of her experience with the Respondent Company and her superior qualifications.

SUMMARY OF INVESTIGATION

The Respondent is one of four Guidance and Control Systems Divisions of Litton Industries and is engaged in the development and manufacture of inertial guidance systems. Litton Industries is a heavy Government contractor and employs over 6000 persons at the Respondent facility.

The Charging Party is a high school graduate whose work history prior to employment with the Respondent consisted of three and one half years experience as a Stenographer and five years experience as a Layout Typist and Publications Technician. Her duties consisted of technical typing,

layout, editing, proofreading, and stripping and opaquing negatives. She obtained employment with the Respondent in October 1961 as a Publications Production Technical Coordinator at a salary of \$110 per week. About a year later, she was transferred from the Technical Publications Production Group, where her performance was evaluated a "superior", to the Publications Quality Control Group at a salary of \$125.60 per week. About a half year later -- in May 1963 -- she was promoted to her present position as a Publications Quality Control Specialist at a salary of \$130.40 per week. In this capacity, she has been rated "exceptionally competent" and has been receiving bi-annual salary increases. Thus, when openings occurred for the position of Publications Quality Control Coordinator, the Charging Party felt that she was more qualified to fill one of these positions than either a male Technical Writer who was appointed to the position in May 1965, or a male Technical Writer who was appointed to the position on October 1966. (The Technical Writer who was appointed on October of 1966 was initially promoted to the position in April 1966 and when the Charging Party filed a grievance that same month, the Respondent rescinded his promotion. In July 1966, he was placed in the position of Quality Control Coordinator and the Respondent delayed making the paperwork effective until October 3, 1966.)

The male who was appointed to the position of Publications Quality Control Coordinator in May 1965 had approximately two and one half years training in Engineering on the junior college and university level, a course in Electronics in the Navy, and a course in Technical Writing, had worked as a Technical Writer approximately a year prior to being employed in this same capacity by the Respondent in June 1964 at a salary of \$175 per week. He was promoted to the position of P. Q. C. C. less than a year later at a salary of \$192.80.

The male who was appointed to the position of P. Q. C. C. in October 1966 had a junior college degree in Business Administration, approximately three and one half years experience in technical writing, coordinating and quality control prior to his employment by the Respondent as a

Technical Writer in November 1961. He received regular bi-annual increases and was earning \$181 at the time of his promotion to Publications Quality Control Coordinator at a salary of \$187. Although he, as a Technical Writer, was a higher salaried person than the Charging Party, as a Publications Quality Control Specialist, she had reviewed his work as recently as March 1966.

According to job descriptions for Publications Quality Control Coordinator submitted by three Managers in Technical Publications Division 02-514, the ability to perform as a Publications Quality Control Specialist is an essential qualification for the job as Coordinator. But in none of the three submitted job descriptions is actual experience as a Technical Writer indicated as an essential qualification for the Coordinator job.

When the Charging Party issued a written complaint on 4-11-66 to the Respondent's Industrial Relations Department in regard to the pending promotion of one of the male Technical Writers, the Respondent failed to properly handle her grievance and caused excessive delay. In spite of the recommendation by the Employees Relations Specialist of the Industrial Relations Division that the Charging Party be promoted to the job in contention, this recommendation was not followed.

By promoting the male Technical Writer in July 1966 and delaying until October the paperwork making the promotion official, the Respondent provided him with on-the-job training in this position, which was not granted to the Charging Party.

DECISION

Reasonable cause exists to believe that the Respondent violated Title VII of the Civil Rights Act of 1964 by discriminating against the Charging Party because of her sex, by failing to promote her to the job of Publications Quality Control Coordinator.

For the Commission

[Seal Affixed]

March 30, 1967
Date

(Signed Marie D. Wilson)
Marie D. Wilson
Secretary

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief and attached Appendix have been served this date by United States air mail, special delivery, in accordance with the rules of this Court, to each of the attorneys for the appellants and the appellees as follows:

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Dated: March 7, 1968


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No. 22422

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY F. CUNNINGHAM,

Appellant,

vs.

LITTON INDUSTRIES,

Appellee.

BRIEF FOR THE APPELLEE LITTON INDUSTRIES,
INC., A CORPORATION.

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I.

Appellant Has Failed to Meet the Jurisdictional Requirements of the Act by Failing to File Her Action Within 180 Days After the Alleged Unlawful Employment Practice Occurred	3
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No. 22422
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MARY F. CUNNINGHAM,

Appellant,

vs.

LITTON INDUSTRIES,

Appellee.

**BRIEF FOR THE APPELLEE LITTON INDUSTRIES,
INC., A CORPORATION.**

Jurisdiction.

This is an appeal taken from an order of District Court dismissing plaintiff's complaint without leave to amend. Jurisdiction of the District Court is conferred by 42 U.S.C. Section 2000(e)-5(f), and this Court has jurisdiction under 42 U.S.C. Section 2000(e)-5(j) and 28 U.S.C. Section 1291.

Counterstatement of the Case.

In her complaint, Appellant alleges that in April, 1966, and October 7, 1966, she was unlawfully refused a promotion solely because of her sex [Clk. Tr. p. 4, lines 1-19]. She thereafter filed a charge with the Equal Employment Opportunity Division* of the Equal Opportunity Commission, alleging discriminatory prac-

*Hereinafter referred to as E.E.O.C. or as the "Commission".

tices. On March 30, 1967, following a finding of probable cause by the Commission, compliance proceedings were held by the Commission and Appellee. On June 7, 1967, Appellant was informed that efforts to secure voluntary compliance had failed [Clk. Tr. p. 4, line 21, to p. 5, line 11]. On July 6, 1967, Appellant filed her complaint herein.

Proceedings in the District Court.

Upon Motion to Dismiss made by Appellee, the District Court made its Order Dismissing the Complaint Without Leave to Amend on the ground that “the maximum time (for filing a complaint under 42 U.S.C. 2000(e)-5) is 180 days from the date of the claimed act of discrimination” [Clk. Tr. p. 21, lines 21-23].

Issue on Appeal.

Under 42 U.S.C. 2000(e)-5, is the maximum time for filing a civil action 180 days from the date of the claimed act of discrimination or at any time that is within 30 days after the claimant receives notification from the Commission that efforts to secure voluntary compliance or conciliation have failed?

ARGUMENT.

I.

Appellant Has Failed to Meet the Jurisdictional Requirements of the Act by Failing to File Her Action Within 180 Days After the Alleged Unlawful Employment Practice Occurred.

Appellant proposes a construction of the statute which is totally untenable. In essence she argues that:

1. Because the alleged unlawful acts constitute a continuing violation there is no limitation on filing a civil action, and
2. Even if there is such a limitation, it commences and runs for 30 days following notification by the Commission there has been a failure of conciliation, and
3. That in either case, any time a Respondent before the Commission follows the statutory scheme for conciliation, he is estopped from thereafter raising the defense that the action is barred by the provisions of 42 U.S.C. Section 2000(e)-5.

It is difficult to imagine an act of an employer which allegedly is violative of the Act which does not have a continuing *effect* upon the claimant. That the legislature was aware of this is immediately apparent upon a reading of Section 2000(g) of the Act, wherein the Court is authorized to award reinstatement and back pay where appropriate.

To hold that an alleged single act of discrimination is a continuing violation is to completely destroy the statutory scheme for expeditious processing of charges

of discrimination. The E.E.O.C. agrees and has issued a bulletin defining isolated and continuing violations.¹

Section 2000(e)-5 of the Act clearly sets forth a maximum time period of 180 days from the date of the alleged act within which to file a civil action. That Congress did not intend the date of notification by the Commission as the commencement of the limitation period is clearly demonstrated by the language of that Section which reads,

“Upon request, the Court may, in its discretion, stay further proceedings for not more than 60 days pending . . . the efforts of the Commission to obtain voluntary compliance”.

In other words, it is plain that Congress foresaw that claimants might be required, by the running of the period for limitation of actions, to file their action while efforts at compliance were still being made by the parties. It is not a novel concept to suggest that plaintiffs file an action to preserve their rights by stopping the running of the statute.

Any suggestion that the proper interpretation of the statute works a hardship on claimants may be answered by a counter-suggestion that the Commission, through its posters, notices and regulations, notify em-

¹“For purposes of jurisdiction, a distinction is made between isolated and continuing violations. An isolated violation is one which is completed when it has occurred. Examples of such violation are refusals to hire, refusals to promote, discharges and other acts of a noncontinuing nature. If such charges are to be brought to the Commission's attention, charges must be filed within the statutory time period. Continuing violations are those which are recommitted each day, such as the maintenance of discriminatory seniority systems, pay scales, or segregated rest-rooms or other facilities. In such cases, charges may be filed with the Commission at any time.” *The First Annual Report, Equal Employment Opportunity Commission*, June 30, 1966, pp. 49-50.

ployees and prospective employees that regardless of the status of a claim before the Commission, civil action must be commenced within 180 days from the alleged act of discrimination.

Appellee is unable to locate, in the record on appeal, any allegation upon which a finding of equitable estoppel might be based, other than the allegation that

“... The Equal Opportunity Employment Commission thereafter sought to secure compliance from the defendant corporation herein unsuccessfully” [Clk. Tr. p. 6, lines 6-8].

Appellee agrees that the keystone of the enforcement provisions of the Act is the voluntary compliance procedure. However, if it is true, as Appellant suggests, that by discussing compliance with the Commission a respondent is *ipso facto* estopped thereafter from raising the defense that the applicable limitation period has run, then one can reasonably expect that no respondent will ever confer with the Commission regarding conciliation. To agree with Appellant's construction would destroy the purpose of the Act by placing an unconscionable price on conciliation, and constitute an egregious disregard for the plain wording of the statute. Section 2000(a) specifically prohibits use of anything said or done during conciliation proceedings as evidence in any subsequent proceeding.

Perhaps the strongest argument against Appellant's position is made by Appellant in her brief. On page 15 of her Opening Brief, she states:

“The regulation preserves the right to insist that if a suit is brought that it be filed within 90 days since either party may exercise his absolute right to request the Commission to send notification after 60 days.”

Thus, Appellant concedes that under no theory of construction does the limitation period commence with the sending of notification by the Commission. This Court then must decide whether the running starts with either (1) the occurrence of the allegedly discriminatory act, or (2) with the filing of the charge with the Commission. While urging this Court to adopt the former construction, a finding that the latter is proper still requires affirmance of the order below.

Assuming that Appellant filed her charge within 90 days of the occurrence of the alleged discriminatory act, on or about September 14, 1966, since the instant action was not filed until July 6, 1967, under either theory Appellant's action is barred.

Analysis of Applicable Cases.

The only case cited in Appellant's brief, or the brief of the E.E.O.C., as *Amicus Curiae*, which is in point, is the case of *Mondy v. Crown Zellerbach Corporation et al.*, 271 F. Supp. 258. However, it should be pointed out that the *Mondy* case was decided July 26, 1967, some five months before the Commission amended its regulations, in a manner and with the effect discussed below.

On January 1, 1967, the Commission amended its regulations by publishing Section 1601.25a and b. In essence, the new regulation was designed to and does cure the very dilemma of which Appellant herein complains so bitterly.

If we assume, *pro arguendo*, that the statutory prerequisites for the filing of a civil action are filing a charge and receipt of notice, then prior to the amendment of the regulations the teachings of *Mondy* apply,

for the claimant was clearly at the mercy of the Commission, for without notice, there could be no right to file an action.

Section 1601.25b clearly disposes of this problem. A claimant, who has filed a charge in a timely manner, and who has had no notice from the Commission for 60 days, is clearly advised that in order to preserve the right to bring a civil action, must request and will receive notification from the Commission.

It is also important to recognize that the Commission itself preserves and recognizes the true statutory scheme of limiting civil actions under the Act. It can hardly be a coincidence that under the amended regulations a claimant can demand and receive notice after *60 days* after filing of the charge. It seems apparent that the Commission selected this period so that a claimant could file his action within the 180 day statutory time limit.

Appellee submits that the regulations promulgated by the Commission carry out Congressional intent. As it stands, a fair reading of the Act and the regulations leads to the inescapable conclusion that:

1. A claimant must file the charge with the Commission within 90 days of the alleged unlawful act,
2. The Commission may send notice within 60 days thereafter, or
3. Either claimant or respondent may demand notice after 60 days following filing of the charge, and the Commission shall *promptly* issue such notice, and
4. If civil action be brought it must be filed within 30 days after receipt of such notice, but in no event later than 180 days after the occurrence of the claimed unlawful act.

It further appears from a reading of the appendix to the brief Amicus Curiae that the charge was filed more than 90 days after the date of the alleged unlawful act (Amicus Curiae brief—Appendix 1). Subsection (d) of 42 U.S.C. 2000 makes the filing within 90 days mandatory. The complaint alleges the unlawful act to have occurred in April, 1966. The charge was filed September 14, 1966. Assuming that the alleged unlawful act occurred on the last day of April, Appellant waited 137 days to file her charge.

The charge was untimely on its face, and should have been dismissed by the Commission. This Court has not been asked to read the 90 day limitation for filing a charge with the Commission out of the statute.²

Appellant also concurs that timely filing of the charge is jurisdictional.

“Appellant timely filed her charge with the Commission, she awaited its notification that conciliation has failed, then she filed her action within 30 days thereafter. These are the only prerequisites under 42 U.S.C. Section 2000(e)-5 to invoke the jurisdiction of the Federal District Court” (Appellant’s Op. Br. p. 6, lines 1-6).

²“A Charge must be filed with the Commission within 90 days after the alleged unlawful employment practice has occurred . . . The Commission will not entertain charges not filed within such periods.” *First Annual Report, Equal Employment Opportunities Commission*, June 30, 1966, p. 49.

Conclusion.

The Order Dismissing the Complaint Without Leave To Amend should be sustained, and Appellee awarded costs of suit together with reasonable attorneys' fees.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PETER W. IRWIN

No. 22422

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY F. CUNNINGHAM,

Appellant,

vs.

LITTON INDUSTRIES,

Appellee.

Brief of Western Airlines, Incorporated, as Amicus
Curiae on Behalf of Defendant Litton Indus-
tries.

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vs.

LITTON INDUSTRIES,

Appellee.

**Brief of Western Airlines, Incorporated, as Amicus
Curiae on Behalf of Defendant Litton Indus-
tries.**

Interest of Amicus Curiae Western Airlines Incorporated.

There is pending in the United States District Court for the Central District of California a case entitled Enrique B. Lopez, Plaintiff v. Western Airlines Incorporated, Defendant, said case being No. 67-1697-TC. That case, like the instant one, involves questions concerning the time limitations for bringing suit under Section 706 of Title VII of the Civil Rights Act of 1964. (42 U.S.C. 2000 e-5.) The position of Western Airlines Incorporated is roughly the same as the position of Appellee Litton Industries in this case, and for that reason a motion was duly made on April 26, 1968, by Western Airlines Incorporated to intervene amicus curiae on behalf of defendant and Appellee Litton Industries. The motion was granted on April 30, 1968, and was filed by the Clerk on May 1, 1968.

Statement.

From the briefs previously filed by the parties to this action, as well as *amici curiae*, it is clear that no significant dispute exists as to the facts of this case. Plaintiff¹ Mary Cunningham was first employed by defendant Litton Industries in October of 1961.

In May of 1965, an opening occurred for a position entitled "Publications Quality Control Coordinator", but the plaintiff was not given the position, allegedly because she was of the female sex, and for no other reason. The May, 1965, date has no bearing on the action, as it is manifestly clear under the Civil Rights Act of 1964, hereinafter referred to as the "Act," that any claim based on alleged discrimination occurring in May of 1965 would be barred by the Statutes of Limitations, regardless of how the same might be construed.

Sometime in April of 1966, defendant Litton Industries created a new position which was also entitled "Publications Quality Control Coordinator". Although plaintiff desired this position, she was not given the position. The job was eventually filled by one Muscarella, who, according to plaintiff, did not have the same high degree of skill and experience which plaintiff enjoyed. Plaintiff allegedly did not receive the position solely because she was of the female sex. At that time the plaintiff complained to her employer and Muscarella was apparently given some special on-the-job training for the position. [Clk. Tr. p. 5, par. VI.] Thereafter, in July of 1966, Muscarella was reappointed the newly

¹For consistency and convenience of reference in this brief, we refer to the parties by their designations in the Court below, namely, Mary F. Cunningham as plaintiff, and Litton Industries as defendant.

created position "Publications Quality Control Coordinator".

Although no specific date is given for the reappointment of Muscarella, construing things in the light most favorable to plaintiff, let us assume that the date of the reappointment of Muscarella was July 31, 1966, as this is the date also relied upon by the Equal Employment Opportunity Commission, hereinafter referred to as "EEOC." (See the Appendix to the brief of the United States and the EEOC.)

On September 14, 1966, plaintiff filed a charge of discrimination against the defendant with the EEOC. Nowhere is it alleged and nowhere is there any evidence that plaintiff ever filed a charge with the California Fair Employment Practices Commission.

On October 4, 1966, EEOC served the charge on defendant Litton Industries, and on March 30, 1967, the EEOC made its decision, as appears more specifically in the Appendix to the brief of the United States and the EEOC.

Thereafter on June 7, 1967, apparently attempting to comply with the provisions of *42 U.S.C. 2000 e-5 (e)*, the EEOC informed the plaintiff that she was now free to commence her action within 30 days. On July 6, 1967, plaintiff filed her action in the United States District Court for the Central District of California.

On September 27, 1967, following a motion to dismiss timely made by defendant Litton Industries, the District Court dismissed plaintiff's complaint without leave to amend, on the ground that plaintiff's action was barred by the Statute of Limitations. This appeal followed.

ARGUMENT.

I.

Valid Conciliation Efforts by the Equal Employment Opportunities Commission Are a Jurisdictional Prerequisite to the Maintenance of a Civil Action Under Section 706 of the Civil Rights Act of 1964.

All parties to this action are in apparent agreement that valid conciliation efforts by the Equal Employment Opportunity Commission are a jurisdictional prerequisite to the maintenance of a civil action, pursuant to Section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5).

Whatever may have been the former state of the law, recent decisions have made it manifestly clear that valid conciliation efforts by the EEOC must be conducted prior to the maintenance of any action against an allegedly discriminatory employer. (*Mondy v. Crown Zellerbach Corp., et al.* (E.D., La., 1967), 271 F. Supp. 258; *Reese v. Atlantic Steel Co.* (D.C., N.E. Ga., 1967), Civil Case No. 10309; *Dent v. St. Louis-San Francisco Railway Co.* (N.D., Ala., 1967), 265 Fed. Supp. 56, affirmed in a *per curiam* opinion by the Fifth Circuit in the case of *Glover v. St. Louis-San Francisco Railway Co.* (C.A. 5, December 5, 1967), Civil Case No. 24288.)

II.

**There Has Never Been a Valid Filing of a Charge
With the Equal Employment Opportunity Com-
mission in This Action.**

**A. The Equal Employment Opportunity Commission Was
Prohibited by Statute From Accepting the Charge When
It Was Originally Filed on September 14, 1966.**

The “decision” of the Equal Employment Opportu-
nity Commission, dated March 30, 1967, and appended
as an exhibit to the brief of the United States and
the EEOC, indicates a complete disregard or total
ignorance by the EEOC of the provisions of *Title 42,*
U.S.C. Sec. 2000-e-5(b). That section specifically pro-
vides, in part:

“In the case of an alleged unlawful employment
practice occurring in a State . . . which has a State
or local law prohibiting the unlawful employment
practice alleged and establishing or authorizing a
State . . . authority to grant or seek relief from such
practice . . . *no charge may be filed* under subsec-
tion (a) of this section by the person aggrieved be-
fore the expiration of sixty days after proceedings
have been commenced under the state or local law,
unless such proceedings have been earlier termi-
nated. . . . If any requirement for the commence-
ment of such proceedings is imposed by a state or
local authority other than a requirement of the fil-
ing of a written and signed statement of the facts
upon which the proceeding is based, the proceeding
shall be deemed to have been commenced for the
purposes of this subsection at the time such state-
ment is sent by registered mail to the appropriate
state or local authority.” (Emphasis added.)

It seems obvious from the language of the foregoing section that the Equal Employment Opportunity Commission was without any jurisdiction to accept any filing of the original charge until sixty days after proceedings had been commenced with the California Fair Employment Practices Commission. Since it nowhere alleged that any proceedings whatsoever were ever commenced with the California Fair Employment Practice Commission, the Federal Equal Employment Opportunity Commission never obtained jurisdiction to accept any filing of a charge of discrimination. For the EEOC to have obtained the requisite jurisdiction it would have been necessary to have informed the plaintiff that she must file a charge with the California Fair Employment Practices Commission as a jurisdictional prerequisite to filing a charge with the Federal Equal Employment Opportunity Commission, pursuant to the requirements of *42 U.S.C. 2000-e-5(b)*. The EEOC, however, did not see fit to inform the plaintiff of the necessity of such a step. As a result it never obtained jurisdiction, there was never a valid filing of any charge with it, and any proceedings taken by the EEOC must be deemed void and a nullity. Since the administrative prerequisites to the maintenance of this action have not been, and cannot now be met, the Court below was correct when it dismissed plaintiff's complaint without leave to amend.

B. Assuming for the Sake of Argument, That the Filing of the Original Charge With the Equal Employment Opportunity Commission on September 14, 1966 Was Valid (Which This Amicus Curiae Does Not for a Moment Believe) Then the EEOC Still Failed to Follow the Statutory Directives With the Result That Plaintiff's Action Was Properly Dismissed.

Title 42 U.S.C. Sec. 2000e-5(e) reads in part, as follows:

“If within thirty days after a charge is filed with the Commission . . . (except that . . . such period may be extended to not more than sixty days upon the determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance . . ., the Commission shall so notify the person aggrieved and a civil action may, within 30 days thereafter be brought against the respondent named in the charge . . .”

It is respectfully submitted that the language of the foregoing section makes it manifestly clear that even assuming the filing of September 14, 1966 was valid, the EEOC had until November 13, 1966, at the very latest, to notify plaintiff of her right to bring a civil action, after which the plaintiff would have until December 13, 1966 to file her action. It would thereafter be barred by the Statute of Limitations set forth in the above section. The instant lawsuit was not commenced until July 6, 1967, almost six months after the date when plaintiff's suit was barred by the provisions of the statute. The action was therefore properly dismissed by the Court below on this additional ground, as well as that raised for the first time by this *amicus curiae*

in section A., *supra*. (Cf. *Evenson v. Northwest Airlines Inc.* (DC., Va., 1967) 268 Fed. Supp. 29).

Plaintiff, together with the United States and the EEOC, urged the position that the limiting provisions contained in 42 U.S.C. 2000e-5(e) are directory rather than mandatory. It is submitted that such a view is not correct, and to the extent that other cases have so held, they should be specifically disapproved by this Court.

As pointed out by the brief of the United States and the EEOC, the private litigant must afford the EEOC the chance to conciliate and obtain voluntary compliance. The statute places an obligation on the Commission to accomplish this with 30 days, or within 60 days if it extends the time. (*Brief of the United States and the Equal Employment Opportunity Commission*, pages 7 and 9.) We agree with that statement of the law, but feel it does not go quite far enough. Under 42 U.S.C. 2000e-5(b), the EEOC is required to give the appropriate state agency an opportunity to conduct proceedings *prior* to the time that the EEOC gets into the picture at all.

The Government urges the position that "to adopt the District Court's construction of the time limitations of Section 706 (e) would place a litigant in the anomalous position of being penalized for a delay for which the EEOC is solely responsible, and over which he has no control." We submit that such is not the case. Pursuant to the Act, most of the cases filed against employers seek (1) injunctive relief, and (2) damages. It is conceded that if the action in a case such as the one before this Court is barred by the Statute of Limitations, the plaintiff's right to an injunction is probably

permanently extinguished. Plaintiff's right to damages, however, remains alive, and although plaintiff's cause of action against the allegedly discriminatory employer is barred, a new cause of action against the United States and the EEOC arises as the result of the negligent failure of the EEOC to comply with the statutory directives. (See point V, *infra*.)

The Government argues that to construe the limiting periods as mandatory runs contrary to the intent of Congress. This is simply not the case. The Act could have been worded in a much different manner and it could very easily have been spelled out that the limiting periods were discretionary and not mandatory. Congress did not see fit to do this. Looking to the four corners of the statute itself it seems manifestly clear that Congress did, in fact, intend the statute to be binding. If, for example, the period were discretionary rather than mandatory, why did Congress bother to add the proviso, as found in 42 U.S.C. 2000-5(e): ". . . except that in either case such a period may be extended to *not more than sixty days* upon a determination by the Commission that further efforts to secure voluntary compliance are warranted . . ."? Had Congress intended the periods to be discretionary it would have been a simple matter to leave the 30-day period in the Act and simply qualify it by appropriate language. Not only did Congress not qualify the 30-day period, it made a specific provision for an extension for an additional 30 days. What could possibly be more mandatory than the words "to not more than 60 days"? It stretches credulity to assume that the Congress of the United States would utilize language of that type if it in fact intended that the statutory limiting periods be discretionary rather than mandatory.

The views of the individual members of Congress only serve to emphasize the wide and varied feelings of those members concerning this Act. In *Hall v. Werthan Bag Corp.* (D.C., M.D. Tenn., 1966), 251 F. Supp. 184, at page 187, we find several remarks made by Senator Javits of New York, who is obviously a strong backer of the Act. The case of *Mondy v. Crown Zellerbach Corp.*, *supra*, at page 263, contains further language of members of Congress.

But other members of Congress have indicated quite a different view when considering the EEOC. According to U.S. Senator Paul Fannin of Arizona, in an article appearing in the March, 1968, issue of *Nations Business*, the record of the EEOC is one of "misuse of power, violation of the spirit and letter of the law, and disruption of the relationships among labor, management and unions." Senator Fannin also quotes Congressman Martha Griffiths of Michigan to the effect that the EEOC officials are, as he put it, "completely out of step with the President, the rest of the administration, the Courts and, indeed, the country as a whole." As an example, the Arizona Senator cites the case of a small midwestern manufacturer who ran afoul of the Commission because he had no job openings and thus declined to hire a negro job seeker who didn't even bother to fill out an application. Six months later, the Commission served a charge of discrimination on the company.

A field examiner for the Commissioner interviewed several employees of the company, trying to find other employees who might enter complaints, and had the incredible gall to admit disappointment when he couldn't develop any because, as he put it, "I like to find

people who aren't happy in their jobs." He admitted that he could discover no evidence of discrimination, yet despite that, the EEOC found the company guilty of an unfair employment practice.

The terms of the so-called "conciliation" and "settlement" stagger even the wildest of imaginations. The EEOC wanted to impose four conditions: First, that the manufacturer hire the negro who had asked about the job, and pay him back wages from the time of his alleged application. Second, that he employ, train, and accept the applications of the next 75 negroes referred to him by a civil rights organization, whether he had openings or not. Third, that he agree to hire negroes for the next five white collar jobs and promote at least three negroes to supervisory positions within three months. Fourth, that the manufacturer not promote any non-negro without the Commission's prior approval.

Commenting on the aforementioned case, one reporter put it: "This unbelievable example of a Government agency telling a private businessman who he must hire and promote may be more outrageous than the average EEOC dictate, but it certainly isn't unusual."² As Senator Fannin put it, most EEOC orders to employers call for reverse discrimination, an end to job seniority arrangements, and an end to job testing. In many cases obedience to EEOC demands would actually require an employer to violate the Taft-Hartley Act.

It therefore becomes obvious that the views of members of Congress on the EEOC are as varied as the winds. It also seems obvious that the limiting periods

²Editorial of James Marine, Radio Station KPOL, Los Angeles, California, March 26, 1968, 8:00 a.m.

placed within the Act were put there as compromise measures, without which passage of the Act might well have been impossible.

III.

Since There Has Never Been a Valid Filing of a Charge of Discrimination With the EEOC, Any Action Purportedly Taken by the EEOC Is Void and a Nullity.

As pointed out in Point I, *supra*, valid conciliation efforts by the EEOC are a jurisdictional prerequisite to the maintenance of a civil suit under Section 706 of the Civil Rights Act of 1964. However, in certain jurisdictions, there are further jurisdictional prerequisites which must be met before the EEOC can even accept the filing of a charge or act thereon. This is the case in the State of California. Under 42 U.S.C. 2000e-5(b), as pointed out *supra*, the EEOC may not accept the filing of a charge prior to the expiration of 60 days after proceedings have been commenced under the state or local anti-discrimination law. To obviate difficulties which could arise in some jurisdictions, the section further provides: “. . . the proceedings shall be deemed to have been commenced for the purposes of this section at the time such statement is sent by registered mail to the appropriate state or local authority.”

The law is well settled that a Federal Court may judicially notice the existence of, and the statutes governing, state commissions, such as the California Fair Employment Practice Commission. (*Rule 33a; Owings v. Hull* (1935), 9 Pet. 607, 9 L. Ed. 246; *Gormley v. Bunyan* (1891), 138 U.S. 623, 11 S. Ct. 453, 34 L. Ed. 1068; *Mills v. Green* (1895), 159 U.S. 651, 16 S. Ct. 132, 40 L. Ed. 293; *Kansas City Western Railway Co.*

v. McAdow (1916), 240 U.S. 51, 36 S. Ct. 252, 60 L. Ed. 520.) In addition to the statutory and decisional authorities for the proposition that a Federal Court may properly judicially notice the existence of and the statutes governing the California Fair Employment Practice Commission, judicial notice may also be taken on the further grounds that the existence of, and the statutes governing the California Fair Employment Practice Commission are facts which are "widely and generally known." (*DeBary v. Arthur* (1876), 92 U.S. 420, 23 L. Ed. 936; *Carroll v. United States* (1925), 267 U.S. 132, 45 S. Ct. 380, 69 L. Ed. 543; *Mandelbaum v. Goodyear Tire and Rubber Co.* (C.C.A. 8, 1925), 6 F. 2d 818.) The foregoing was further strengthened by two recent cases which held that the statutes and administrative acts of the states in which Federal Courts are sitting may be judicially noticed, and state law need not be pleaded. (*Brown v. Graham* (D.C. Ore., 1959), 169 F. Supp. 397; *Beach v. Grollman* (E.D. Penn., 1959), 169 F. Supp. 612.)

This Court may properly take judicial note of the fact that California has a "state authority" within the meaning of 42 U.S.C. 2000e-5(b) and therefore the EEOC was powerless to receive any filing of any charge whatsoever until "60 days after proceedings have been commenced under the state . . . law." Since no proceedings have ever been commenced under the appropriate state law, the Equal Employment Opportunity Commission has never obtained the requisite jurisdiction over this matter, there has been no exhaustion of administrative remedies, and the Court below acted properly in dismissing the action without leave to amend.

IV.

Since There Has Never Been Any Valid Conciliation Effort by the EEOC, and Can Be None at This Late Date, the Court Below Was Correct in Dismissing Plaintiff's Complaint Without Leave to Amend.

As was discussed previously, no charge has ever been validly filed before the EEOC. Since no charge was ever validly filed, the EEOC never obtained jurisdiction and the action was properly dismissed. The question then arises, can a charge be filed with the EEOC at this late date? The answer is "No".

42 U.S.C. 2000e-5(a) is the broad, governing paragraph which covers the filing of charges before the EEOC. It is further limited by the provisions of paragraphs 5(c), 5(d), and 5(e) of the same section. Of primary importance here is section 5(d). This section provides:

"A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within 210 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the state or local agency has terminated the proceedings under the state or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the state or local agency."

Since well over a year and a half have gone by since the last act of alleged discrimination, any filing with the EEOC at this late date is barred, regardless of how the period is computed or what interpretation is placed upon the various statutory provisions. Whether we use the 90-day section or the 210-day section makes no difference, since both have long since elapsed. As pointed out in Point II B, even construing every possible fact in favor of the plaintiff, and assuming for argument sake that the original oiling of September 14, 1966 was valid, which it in fact was not, plaintiff's action is still barred by the failure of the EEOC to comply with the provisions of U.S.C. 2000e-5(e).

V.

Plaintiff Has Not Been Deprived of Her Remedy.

Due to the Negligent Failure of the EEOC to Follow the Statutory Directives Imposed Upon It, Plaintiff's Action for Damages May Not Be Properly Maintained Against the United States and the EEOC.

At the outset, it must be conceded that plaintiff has, in all probability, lost her right to injunctive relief as the result of the running of the Statute of Limitations. Her right to seek damages from defendant Litton Industries is also barred by the Statute of Limitations, but simultaneously with the running of the Statute of Limitations, as the result of the negligent failure of the EEOC to discharge its statutory duties, plaintiff gained a new cause of action against the United States and the EEOC.

Pursuant to the provisions of 28 U.S.C. 1346(b), District Courts of the United States have original

jurisdiction, concurrently with the Court of Claims, of civil actions on claims against the United States, for money damages, for injury or loss of property caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The position of the EEOC is very similar to the position occupied by a lawyer handling a case for his client. If the client has a good cause of action for some injury suffered by the client, and the lawyer negligently fails to file his client's action within the proper statutory period, the client's cause of action against the original defendant is barred by the Statute of Limitations, but a new cause of action immediately arises against the lawyer for professional malpractice, recovery for which is had on a negligence theory.

The EEOC stands in much the same position as the aforementioned lawyer. It has been consulted by an aggrieved party in order that it may satisfy the demands of the aggrieved party and hopefully solve whatever problem may exist. Just as the lawyer has from the date of his initial interview with his client until the running of the Statute of Limitations to settle his client's action or file a lawsuit, so the EEOC has from the date of the filing of the charge until 60 days thereafter to conciliate or settle the matter, or advise the aggrieved party to bring a civil action within 30 days. The failure of the EEOC to discharge its duties is exactly the same as the failure of a lawyer to file an action before the running of the Statute of Limitations.

28 U.S.C. 2674 makes it clear: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." Further, it has been held that the United States may be liable under 28 U.S.C. Sec. 2674, and Sec. 1346(b), even though none of its employees is legally liable to the person injured. (*U.S. v. Hull* (C.A., Mass., 1952); 195 F. 2d 64.) Similarly, as the Court pointed out in *Ingham v. Eastern Airlines Inc.* (C.A. 2, 1967), 373 F. 2d 227, at page 236:

"It is now well established that when the Government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently. Thus, for example, though the Government may be under no obligation in the absence of statute to render medical care to discharged veterans, when it decides to provide such services and does so negligently, it has been held liable under the Tort Claims Act. *U.S. v. Brown*, 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 139 (1954)."

In the instant case the Government undertook to investigate and attempt to conciliate the plaintiff's differences with defendant Litton Industries. It did so pursuant to a specific statutory scheme which established the EEOC. As the result of the negligent failure to follow the statutory directives, plaintiff's lawsuit against the defendant is now barred by statute. She therefore has a good cause of action against the Government. As that Court in the *Ingham* case, *supra*, so aptly pointed out:

"Moreover, we can give little weight to the Government's claim that since its initial decision to provide weather information was a gratuitous one, it

could proceed with impunity to violate its own regulations and act in a negligent manner. Dean Prosser has put this doctrine to rest in his treatise: 'The Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing.' Prosser, *Law of Torts*, 333 (3rd Ed. 1964)."

The Government will no doubt, as it did in the *Ingham* case, *supra*, fall back on the defense that even if it did breach a duty and even if that breach was the proximate cause of the injuries now suffered by plaintiff, the Government is exempted from liability by virtue of the provisions of 28 U.S.C., Sec. 2680. That section provides, in part:

"The provisions of this chapter and section 1346(b) of this title shall not apply to:

a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion be abused. . . ."

The Court in the *Ingham* case, *supra*, has laid any such defense to rest once and for all. As the Court said, at page 238:

"The Government cannot, therefore, disclaim its liability on the ground that the omission occurred in the execution of a regulation, for, in fact, it failed to comply with the regulation by omitting to furnish necessary information."

Here, of course, the Government failed to comply with the regulations governing the EEOC by failing to notify the plaintiff of her right to bring a civil action within the time set forth in the statute. The language of the statute is clear when it says, in 42 U.S.C. 2000e-5(e): “. . . The Commission *shall* so notify the person aggrieved and a civil action may, within 30 days thereafter be brought . . .” (Emphasis added.)

VI.

Even Assuming That the Filing of the Charge With the EEOC on September 14, 1966 Was Valid, Plaintiff's Action Is Nevertheless Barred by the Statute of Limitations, Regardless of How the Statutory Period Is Computed, and the Court Below Was Correct in Its Ruling.

A. Assuming a Jurisdiction Without Anti-Discrimination Legislation Within the Meaning of 42 U.S.C. 2000e-5(b), the Action Is Still Barred.

Even assuming that the State of California does not have antidiscrimination legislation falling within the definition of 42 U.S.C. 2000e-5(b), which is not the case, plaintiff's action is still barred since it was not filed within the period prescribed by Section 706 of the Civil Rights Act of 1964. The Government in this case has argued vigorously “for to require that suit must be filed within 180 days after the alleged act of discrimination without regard to the status of the EEOC's effort would, as we see it, diminish the possibility of compliance through private informal conference and conciliation.” (Brief of the U.S. and the EEOC, p. 11). Are we really supposed to assume that the various periods set forth throughout Section 706 of the Civil Rights Act of 1964 are meaningless?

Apparently the Government regards some sections to be mandatory, and other sections to be discretionary, but gives us no clue as to precisely how we are to separate one from the other. Following the Government's line of reasoning, the EEOC could theoretically take unlimited time in the handling of a case before notifying a prospective plaintiff of the right to bring a civil action, and the plaintiff would thereafter have 30 days—although we are in no way given a clue as to why the 30-day period is mandatory, whereas the 60-day period imposed on the EEOC is discretionary—in which to file a civil action. We respectfully submit that such an argument must fail in the light of reason and logic.

Consider the situation involving the private litigant who has suffered personal injuries. The litigant theoretically goes to an attorney after suffering the injuries, and discloses the facts of the particular case. The attorney then contacts the defendant and attempts to settle the matter in an amicable manner, without the necessity of filing a formal lawsuit. If, however, it becomes apparent that no settlement is possible, or that the Statute of Limitations, whatever it may be, is in danger of running, the attorney naturally files the action. Does this mean that at the instant of the filing of the action all further settlement measures are hopelessly blocked? We hardly think so. Just as further settlement efforts would not be barred in a case such as the example just given, neither are they barred or in any way hindered by the filing of the civil action after the EEOC has made its 60-day attempts at conciliation. It is even conceivable that attempts at settlement might be helped in some instances by the filing of a timely lawsuit!

The fact that the EEOC may have a “burdensome caseload” is in no way persuasive that the mandatory provisions of Section 706 of the Civil Rights Act of 1964 should be disregarded. To permit the EEOC to overlook or avoid its statutory responsibilities simply because it has a “burdensome caseload” flies in the face of reason. The regulation of the EEOC which purports to get around the established statutory scheme set up by Congress is obviously invalid, and violative of the very act which brought the Commission into being. Fortunately for us all, the EEOC does not have the power to enact legislation. To the extent that any of its regulations are contrary to the provisions of any statute duly enacted by Congress, those regulations are invalid, and may be disregarded in their entirety. Such is the case of the Commission’s regulation as set forth on page 12 of the brief of the United States and the EEOC. However the EEOC might wish to overrule the Congressional directives contained within the Act, they are powerless to do so. We are unable to agree with the contention of the Government and the EEOC that “The regulation clearly evidences an intent to fulfill the statutory scheme . . .” (Brief of the United States and the EEOC, p. 12.) Rather, we think it clearly evidences a futile attempt to get around the mandatory provisions set forth by Congress in section 706 of the Civil Rights Act of 1964. It is particularly interesting to notice that 42 U.S.C. 2000e-5(e) uses the specific language: “. . . The Commission shall so notify the person aggrieved . . .”, while the Commission’s regulation states: “. . . The Commission shall *not* issue a notice . . .” (Emphasis added.) Is the Government really taking the position

Apparently the Government regards some sections to be mandatory, and other sections to be discretionary, but gives us no clue as to precisely how we are to separate one from the other. Following the Government's line of reasoning, the EEOC could theoretically take unlimited time in the handling of a case before notifying a prospective plaintiff of the right to bring a civil action, and the plaintiff would thereafter have 30 days—although we are in no way given a clue as to why the 30-day period is mandatory, whereas the 60-day period imposed on the EEOC is discretionary—in which to file a civil action. We respectfully submit that such an argument must fail in the light of reason and logic.

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that the EEOC by passing a simple regulation has the power or authority to overrule and nullify a specific act of Congress?

While we do not argue for one moment with the well established rule of law that administrative regulations promulgated pursuant to statutory authority have the force and effect statutes, (*Rodriguez v. Dunn* (D.C. Mich., 1955), 128 F. Supp. 604, affirmed 249 F. 2d 958; *Hertz Corp. v. The U.S.* (D.C. Del., 1958), 165 F. Supp. 261, reversed on other grounds 268 F. 2d 604, affirmed 80 S. Ct. 1420, 364 U.S. 122, 4 L. Ed. 2d 1603, rehearing denied 81 S. Ct. 31, 364 U.S. 854, 5 L. Ed. 2d 78), the law is clear and well settled that a Federal commission may not, by its regulations, alter or amend the law which Congress has enacted. (*Morrill v. Jones* (Me., 1882), 1 St. Ct. 432, 106 U. S. 466, 27 L. Ed. 267; *Bong v. Alfred S. Campbell Art Co.* (N.Y., 1909), 29 S. Ct. 628, 214 U.S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126; *Williamson v. U.S.* (Ore., 1908), 28 S. Ct. 163, 207 U.S. 425, 52 L. Ed. 278; *Campbell v. U.S.* (Ct. Cl., 1882), 2 S. Ct. 759, 107 U.S. 407, 27 L. Ed. 592; *Illinois Central Rwy. Co. v. U.S.* (1917), 52 Ct. Cl. 53; *Sherlock v. U.S.* (1908), 43 Ct. Cl. 161; *Symonds v. U.S.* (1886), 21 Ct. Cl. 148, affirmed 7 S. Ct. 411, 120 U.S. 46 30 L. Ed. 557; *Pederson v. Benson* (1958), 255 F. 2d 524, 103 U.S. App. D.C. 115; *United States v. Gredzens* (D.C. Minn., 1954), 125 F. Supp. 867.) To the extent that the regulation of the EEOC as set forth in 29 C.F.R. 1601.25a (Jan. 1, 1967) is inconsistent with Section 706 of the Civil Rights Act of 1964, it should be specifically overruled by this Court.

Conclusion.

From the foregoing it is respectfully submitted that the Court below acted properly and in accordance with the clear mandate of the law when it dismissed plaintiff's complaint without leave to amend. Federal agencies, such as the EEOC, will only be an effective force for good within these United States when they conduct their business in accordance with the statutory scheme established by Congress, and in compliance with the spirit and the letter of the law.

Respectfully submitted,

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Certification.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MITCHELL L. LATHROP

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

WESTERN BUILDING MAINTENANCE COMPANY
AND SERVICE AND MAINTENANCE
EMPLOYEES UNION, LOCAL 399,
BUILDING SERVICE EMPLOYEES INTER-
NATIONAL UNION, AFL-CIO,

Respondents.

BRIEF FOR THE NATIONAL
LABOR RELATIONS BOARD

FILED

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United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 22,423

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

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WESTERN BUILDING MAINTENANCE COMPANY
AND SERVICE AND MAINTENANCE
EMPLOYEES UNION, LOCAL 399,
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Respondents.

BRIEF FOR THE NATIONAL
LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board to enforce its order issued against respondents (hereafter called the "Company" and the "Union") on January 10, 1967, following proceedings under Section

10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).¹ The Board's decision and order (R. 61-90, 117-118)² are reported at 162 NLRB No. 73. This Court has jurisdiction over the proceedings under Section 10(e) of the Act, since the unfair labor practices occurred at Los Angeles, California, within this judicial circuit, where the Company is engaged in the business of providing building maintenance services.³

¹ Pertinent provisions of the Act are set forth *infra* in Appendix A.

² References to the pleadings and decision and order of the Board, the Trial Examiner's recommended decision and order and other pertinent papers reproduced as Volume I, pleadings, are designated "R". References to portions of the stenographic transcript reproduced pursuant to the Rules of this Court are designated "Tr." "G.C. Ex." refers to the General Counsel's exhibits. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

³ The complaint originally named some 64 employers, in addition to the Company, generally referred to as maintenance contractors or contractors, as Parties in Interest. During the course of the hearing, counsel for the General Counsel moved to amend the complaint by striking the names of some 47 of the Parties in Interest, and all allegations applicable to said parties (R. 62-63; Tr. 31-34, 101-102). Based on the ground that, as to some of these parties, the volume of their business did not conform to the Board's jurisdictional standards, and that, as to others, they had not participated in the unfair labor practices, the motion was granted without objection (R. 62-63; Tr. 34, 102). The remaining Parties in Interest are as follows:

Affiliated Maintenance Co.; All American Maintenance Co., Inc.; Allstate Building Maintenance Co.; American Building Maintenance Co.; B & G Janitor Service; J. E. Benton Management Corp.; Building Service Company of Los Angeles; California Building Maintenance Company; Coast Building Maintenance Co.; County Building Maintenance Company, Inc.; Esquire Building Maintenance Company; Los Angeles Building Maintenance Company, Inc.; Neilson Enterprises, Inc.; Royal Building Maintenance; Santa Ana Building Maintenance Company; Security Maintenance Services, Inc.; Southland Maintenance Co.; Terminal Building Maintenance; Western Building Maintenance Co.

As shown *infra* p. 10, the Board's order against the Union requires reimbursement of certain dues paid by employees of the Parties in Interest.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that by engaging in the practice of informing applicants for employment or newly-hired employees that they must join the Union immediately, by furnishing newly hired employees with union-membership applications and dues checkoff authorizations, and by deducting from the wages of such employees union dues during the first 30 days of employment and remitting said dues to the Union, the Company unlawfully assisted the Union in violation of Section 8(a)(2) and (1) of the Act. The Board further found that by jointly engaging and participating in a hiring procedure, whereby job applicants or newly-hired employees were required to execute union-membership applications and dues checkoff authorizations prior to the expiration of the first 30 days of their employment, the Company and the Union violated Section 8(a)(1), (2) and (3), and Section 8(b)(2) and (1)(A) of the Act, respectively. The evidence upon which the Board based its findings is summarized below.

A. Background

Each of the employer parties, including the Parties in Interest named in the original complaint, is signatory to an identical industry-wide collective bargaining agreement with the Union, which has been in effect since August 1, 1963 (R. 65; Tr. 35; G.C. Exh. 3). The agreement contains conventional union-security provisions requiring members of the Union in good standing on the effective date of the agreement to remain members, and all employees hired thereafter to become members after 30 days of employment or 30 days after the effective date of the agreement, whichever is later. Also

included is a provision for a checkoff of union dues and initiation fees upon proper written authorization by the employees (R. 65; GCX 3, see especially Article III Section 1 and Article IV Section 1). ⁴

**B. The Union's Unlawful
Implementation of the Contract**

Purportedly in implementation of these provisions, on about November 26, 1963, the Union issued a mimeographed bulletin on its letterhead, addressed "TO ALL MAINTENANCE CONTRACTORS." The bulletin carried a notice at the top, "IMPORTANT: — PLEASE SEE THAT THIS INFORMATION REACHES YOUR PAYROLL DEPARTMENT!!" and began:

"There seems to be some confusion among the various maintenance contractors as to the proper dues deductions. We are sending this letter to clarify the matter." The bulletin explained the obligations of the contractors under the check-off provisions of the contract, and continued, in relevant part,

"4. In addition, employees who have worked for a Union employer less than 30 days shall be considered *probationary members* and dues shall be deducted for said probationary members at the rate of 25¢ *for each day of work*, up to a maximum of the regular monthly dues for the classification in which said probationary members are working.

"5. The *dues and initiation fees* for regular members shall be deducted in accordance with

⁴ The General Counsel did not contend, nor did the Board find, that these provisions of the contract were unlawful (R. 65, 73).

the provisions of Article IV — Check Off — of the standard Maintenance Contractors Agreement.” (Emphasis in original) (R. 67; GCX 4).

Copies of the bulletin were mailed by the Union to all maintenance contractors who were parties to the standard collective bargaining agreement (R. 68; Tr. 45).

On June 1, 1964, the Union issued another bulletin to the maintenance contractors (R. 68, Tr. 46), bearing the legend at the top: “VERY IMPORTANT: PLEASE SEE THAT THE FOLLOWING INFORMATION REACHES YOUR SUPERVISORS AND PAYROLL DEPARTMENT.” There followed a schedule of initiation fees and dues for employees in various job classifications, with further detailed instructions, including the following:

“PROBATIONARY DUES:

Anyone in authority hiring any employee must advise these employees that they will be charged at the rate of *twenty-five (25¢)* for each day worked during the first 30 days of employment, up to a maximum of \$4.50 for female employees or \$5.00 for male employees. Employees working after the 30th day following the beginning of their employment shall become regular members of the Union, and the Initiation Fees shall be deducted with the first month’s dues, in accordance with Check-Off procedure — Article IV — Section “B” of the Standard Maintenance Contractors Agreement. . .” (Emphasis in original.)

The bulletin closed:

“COMMENT:

YOU ARE FULLY RESPONSIBLE TO
ADHERE TO ALL THE ABOVE CON-
DITIONS.” (R. 68; GCX 5)

The Union, in several instances, supplemented its written edicts with oral representations to contractors, reminding them that union dues during the first 30 days of employment of newly-hired employees were 25 cents a day (R. 76; GCX 8(a) and 8(b), para. 14). Additionally, the Union policed its dues deduction policy by conducting audits of the payroll records of several maintenance contractors and submitting invoices covering dues not deducted or remitted as specified in its various directives (R. 76, 19; GCX 8(a) and 8(b) para. 14). Deductions were in fact made by the employers pursuant to these invoices (*Ibid.*).

On September 8, 1965, after the filing of the charge and before the issuance of the complaint in this case, the Union issued another directive to all maintenance contractors covered by the collective bargaining agreement countermanding its dues policy as set forth in the November 26 and June 1 bulletins (R. 68-69; Tr. 47-48; GCX 6). The bulletin stated in pertinent part:

“(4) Effective immediately, no Employer shall follow the practice of deducting 25¢ for each days work during the first 30 days of employment of new employees.

* * *

“(6) The Employer shall present to each new employee at the time of hiring, the statement which is attached to these procedures together with a copy of the Agreement and an

application card for Local 399 and check off authorization card. The employer shall not in any way require the new employee to sign the application or check off card as a condition of hiring the new employees. No representative of the Employer shall in any way coerce, force or require the new employee to sign the authorization dues check off card. . .” (R. 68-69; GCX 6). ⁵

Nevertheless, the Union notified some maintenance contractors that they were still liable for newly-hired employees’ dues which had accrued during the first 30 days of their employment prior to the issuance of the September 8 bulletin (R. 77; Tr. 113-114). None of the contractors remitted to the Union any dues allegedly owing pursuant to such notice (*Ibid.*).

C. The Company’s Hiring Procedure

Under the Company’s hiring procedures, the job applicant was usually interviewed by a receptionist, who furnished him with an employment application. After preliminary screening, the completed application was submitted to any one of a number of supervisors. Successful applicants were generally told that employment was “contingent” upon joining the Union (R. 72; Tr. 20; GCX 8(a) Para. 1) and were provided

⁵ Attached to this bulletin were new forms for membership application and payroll deduction authorization, as well as a new form (entitled “NOTICE TO EMPLOYEES”) which informed them of the existence of a labor contract with the particular maintenance contractor, providing for union-security, but advised that: “You are not required to join until after 30 days from the date of your hiring; however, you have the right to voluntarily and of your own choice, join the Union prior to the 30 day period” (R. 69; GCX 6).

with a set of forms to complete. These forms included a Withholding Exemption Certificate; an Application for Employment; a Personnel Check Sheet; and an "Employment Package," consisting of a three-part perforated form, numbered consecutively 1 to 3, and designated respectively, "APPLICATION FOR MEMBERSHIP," "PAYROLL DEDUCTION AUTHORIZATION," and "DESIGNATION OF BENEFICIARY" (R. 71, 72; Tr. 20-21, GCX 8(a) Para. 1, GCX 2).⁶ At the top of the "Employment Package" form appeared the legend, "ALL THREE PARTS OF THIS FORM MUST BE COMPLETELY FILLED OUT BY EMPLOYEE." Underneath the heading, "APPLICATION FOR MEMBERSHIP," were the words, "To be Returned to Union Office, DUES DEPT. Accompanied with Initiation Fee and/or First Month's Dues" (R. 72; GCX 2). Nothing was said to newly-hired employees about having 30 days' time to submit these forms (R. 71; GCX 9), nor were they told *when* union dues deductions would actually be made (R. 72; Tr. 20; GCX 8(a) Para 1). Rather, newly-hired employees were told that completion of the Exemption Certificate and Payroll Deduction Authorization forms was a prerequisite to their getting paid (R. 71; GCX 9), and in practice, therefore, all of the forms were generally completed and returned to the Company "immediately" (R. 71; GCX 9). Thereafter, the Company, beginning with the first day of employment, deducted 25 cents per day from the new employee's wages, the total deductions during the first 30 days not exceeding an amount equal to the regular monthly dues. The dues of an employee starting work on the first of the month were remitted to the Union on the 20th of the month. When the employee had

⁶ The entire "Employment Package" form, prepared by the Union, was supplied in quantities to all maintenance contractors or employers by the Union (R. 72; Tr. 49-50).

completed 30 days of employment, the Company then deducted one-half of his initiation fee, together with regular monthly dues in the pay period following the initial 30 days. The remaining one-half of the initiation fee, together with dues for that month was deducted 60 days from the first day of employment. (R. 71-72; GCX 9.)⁷

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board, in agreement with the Trial Examiner, found that the Company violated Section 8(a)(2) and (1) of the Act by unlawfully assisting the Union in obtaining employee signatures to union membership applications and dues checkoff authorizations as a condition of employment. The Board further found that by jointly engaging in a practice whereby newly-hired employees were required to join the Union and pay dues sooner than is permissible under the 30-day statutory grace period, the Company and the Union respectively violated Section 8(a)(1), (2), and (3) and 8(b)(2) and (1)(A) of the Act. (R. 82-83.)

⁷ The hiring procedures of all the Parties in Interest were substantially similar to those related above, with the exception of Allstate Building Maintenance Co., Coast Building Maintenance Co., and Royal Building Maintenance. At Allstate Building Maintenance Co., applicants for employment were told that they would not be required to join the Union until after 30 days, and that no dues would be deducted during the first 30 days of their employment (R. 75; GCX 8(a)). At Coast Building Maintenance Co., applicants for employment were informed that they would not be required to join the Union during the first 30 days, but that membership dues, at the rate of 25 cents a day, would be deducted during the first 30 days of their employment (R. 75; GCX 8(a)). At Royal Building Maintenance, applicants were informed that they would be required to join the Union, but that no dues would be deducted from their wages until after 30 days of employment. However, regardless of what was said to job applicants and newly-hired employees concerning union membership and the payment of dues, all of the Parties in Interest deducted dues on behalf of the Union during the first 30 days of employment (R. 75, 76; GCX 8(a) and 8(b)).

The Board's order directs respondents to cease and desist from participating in the checkoff of union dues for employees pursuant to membership-dues-checkoff authorizations unlawfully obtained from the employees prior to the 30-day statutory period and from, in any like or related manner, restraining ~~with~~ employees in the exercise of their Section 7 rights, and to post the usual notices. The Board further ordered the respondents jointly and severally to reimburse all the Company's employees for dues illegally exacted from them during a period commencing 6 months prior to the time the charge was filed in this case and ending on September 8, 1965, the time of the Union's corrective action. Additionally, the Union was ordered to reimburse the employees of the Parties in Interest for dues illegally exacted during this same period. (R. 83-90).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY AND UNION VIOLATED SECTION 8(a)(1), (2) and (3) AND 8(b)(1)(A) AND (2) OF THE ACT RESPECTIVELY BY MAINTAINING AN ARRANGEMENT WHEREBY NEW EMPLOYEES WERE REQUIRED TO JOIN THE UNION AND AUTHORIZE THE CHECK-OFF OF DUES AS A CONDITION OF EMPLOYMENT PRIOR TO THE EXPIRATION OF THE THIRTY DAY STATUTORY GRACE PERIOD.

Section 7 of the Act guarantees employees the right to refrain from joining a labor organization, except as such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3). This latter section permits an employer and a union representing a majority of his employees to enter into a union security agreement requiring union membership as a condition of employment "on or after the thirtieth

day following the beginning of such employment.” It is a violation of Section 8(a)(3) for an employer to discriminate with respect to the hire and tenure of employees by disregarding the statutory restrictions concerning union security agreements. Section 8(b)(2) in relevant part prohibits the union from causing or attempting to cause an employer to violate Section 8(a)(3). Rounding out the statutory scheme, Section 8(a)(1) and 8(b)(1)(A) bar employers and unions from restraining and coercing employees in the exercise of their Section 7 rights, including their right to refrain from joining unions except under the special situation described above.

The Board found that although the union security agreement between the Company and Union was lawful on its face and purported to protect employees against discrimination during the statutory 30-day grace period, the parties, in disregard of their agreement, engaged in an arrangement which required employees to become Union members and to execute dues checkoff authorizations before the expiration of the statutory grace period. It is clear, in view of the express statutory command that employees be given 30 days after hiring within which to become union members, that the Company and Union have violated the Act by denying the employees the protection guaranteed by the Act. See, *N.L.R.B. v. Campbell Soup Co. and Butchers Union Local 127, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO*, 378 F.2d 259 (C.A. 9), *cert. denied*, 389 U.S. 900; *N.L.R.B. v. Cadillac Wire Corp., and Local 810, International Brotherhood of Teamsters*, 290 F.2d 261, 262 (C.A. 2); *N.L.R.B. v. Industrial Rayon Corp. and Local 600, International Union of Operating Engineers*, 297 F.2d 62, 63 (C.A. 6); *Lakeland Bus Lines, Inc. v. N.L.R.B.*, 278 F.2d 888, 890 (C.A. 3); *N.L.R.B. v. Gottfried Baking Co.*, 210 F.2d 772, 779-780 (C.A. 2); *N.L.R.B. v. Associated Machines, Inc.*, 239 F.2d

858 (C.A. 6).⁸ Furthermore, it is clear that in determining whether a violation of this nature has been committed, the Board is empowered to look beyond the terms of the agreement which, while "not violative of the Act on its face" was carried out in a discriminatory manner. *N.L.R.B. v. International Association of Heat and Frost Insulators*, 261 F.2d 347, 349-350 (C.A. 1). In such circumstances, the Board's inquiry is mainly a factual one and "the unfair labor practice can be found from a procedure which shows a practice or understanding" and which results in depriving employees of their statutory rights. *N.L.R.B. v. Local 420, United Association of Journeymen*, 239 F.2d 327, 330 (C.A. 3); see also *N.L.R.B. v. International Union of Operating Engineers, Little Rock, Local 382-382A*, 279 F.2d 951, 955 (C.A. 8); *N.L.R.B. v. Construction Specialties Co.*, 208 F.2d 170, 173 (C.A. 10).

The undisputed facts in this case clearly establish such an infringement upon the statutory rights of employees. The record shows that the Company's hiring procedure, viewed as a totality, pressured newly-hired employees to join the Union and to execute dues checkoff authorizations prior to the expiration of the statutory grace period. Thus, the Company informed

⁸ It should be noted that even after the expiration of the 30-day statutory grace period, "the Act permits employees freedom to choose the method of payment, either by checkoff or by direct payment to the Union [and] an employer may not interfere with this freedom of choice," *Sterling Precision Corp., Instrument Division*, 131 NLRB 1229, 1235; *N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro*, 374 F.2d 974 (C.A. 9), cert. denied, 389 U.S. 913, enforcing *Seine and Line Fishermen's Union of San Pedro, et al.*, 136 NLRB 1, 11, 12 and *Paul Biavezich et al. d/b/a M V "Liberator" et al.*, 136 NLRB 13, 22; *Confectionery and Tobacco Drivers and Warehousemen's Union v. N.L.R.B.*, 312 F.2d 108, 114-115 (C.A. 2); *American Screw Company*, 122 NLRB 485, 488-489. Cf. *Felter v. Southern Pacific Co.*, 359 U.S. 326.

job applicants that employment was contingent upon joining the Union and routinely provided them with employment forms to be completed, including a union membership application and payroll deduction authorization form. A sense of compulsion with respect to the completion of these forms was conveyed to them not only by the nature of the forms and the instructions imprinted thereon, but also by the Company's explicit requirement that the Exemption Certificate and Payroll Deduction Authorization forms be completed and returned before an employee was paid. Nor did the Company attempt to alter this impression, for nothing was said to newly-hired employees about having 30 days' time to join the Union. Such a hiring procedure, unqualified by any reference to the statutory grace period, clearly brings pressure to bear on the employee to join the Union immediately and, therefore, is inimical to the congressional purpose in providing for the 30-day period.⁹

⁹ The legislative history of the Act discloses that the purpose of the grace period was to give an employee 30 days to decide whether he likes his job well enough to be willing to incur the additional expense of initiation fees and dues. House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., House of Representatives, p. 9 (1947), 1 Legislative History of the Labor Management Relations Act 1947, p. 300 (Govt. Print. Off., 1948); 93 Cong. Rec. 3556, 1 Leg. Hist. 737.

The Company's conduct is no less unlawful because certain employees successfully resisted its effort to require them to join the Union during the 30-day statutory grace period; for other employees, who may not be aware of their rights under the Act, may be constrained to join the Union and execute checkoff authorizations under the misapprehension that they are required to do so in order to obtain employment. Cf. *N.L.R.B. v. Brown-Dunkin Co.*, 287 F.2d 17, 18 (C.A. 10); *N.L.R.B. v. McBride Construction Co.*, 274 F.2d 124, 127 (C.A. 10); *N.L.R.B. v. Hill & Hill Truck Line*, 266 F.2d 883, 885 (C.A. 5).

The Company's role in the unlawful hiring procedure furnishes ample support for the Board's conclusion that the Company violated Section 8(a)(2) of the Act. Section 8(a)(2) makes it unlawful for an employer to "contribute financial or other support" to a labor organization. It cannot be seriously disputed that the Company's actions during the hiring process in telling employees, in effect, that they were required to join the Union, in securing signatures for Union application and authorization forms, and in collecting Union dues during and for the 30-day statutory grace period, constitute "support" within the meaning of Section 8(a)(2). Courts have long recognized that the advantages flowing to a union from an unlawful union security arrangement are considered potent support within the meaning of that section. *N.L.R.B. v. Campbell Soup Co. and Butchers Union Local 127, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO*, 378 F. 2d 259 (C.A. 9), *cert. denied*, 389 U.S. 900; *N.L.R.B. v. L. Ronney & Sons*, 206 F.2d 730, 734 (C.A. 9), *cert. denied*, 346 U.S. 937, *rehearing denied*, 347 U.S. 914; *N.L.R.B. v. Gottfried Baking Co.*, 210 F.2d 772, 780-781 (C.A. 2); *N.L.R.B. v. Broderick Wood Products Co.*, 261 F.2d 548, 550 (C.A. 10); *N.L.R.B. v. Trosch*, 321 F.2d 692, 697 (C.A. 4), *cert. denied*, 375 U.S. 993; *N.L.R.B. v. Associated Machines, Inc.*, 239 F.2d 858 (C.A. 6).

The Union's complicity in and responsibility for the unlawful hiring procedure are manifest upon the undisputed facts on the record. The Union's issuance of directives to all maintenance contractors on November 26, 1963, and June 1, 1964, in addition to similar oral representations, and its attempts to compel compliance with its policy as stated therein by conducting audits of the payroll records of the maintenance contractors and by submitting bills for dues not deducted by employees during the first 30 days of employment, amply

support the Board's conclusion that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing employers with whom it had contracts to discriminate in regard to the hire and tenure of employees.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.¹⁰

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National Labor Relations Board.

February 1968

¹⁰ The fact that respondents have discontinued the unlawful arrangement is no defense to a petition for enforcement of the Board's order. *N.L.R.B. v. Mexia Textile Mills*, 339 U.S. 563; *N.L.R.B. v. Trimfit of California*, 211 F.2d 206, 208 (C.A. 9). Moreover, as shown *supra* p. 10, that order contains a reimbursement requirement as well as cease-and desist provisions.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds

for believing that membership was denied or terminated for reasons other than the failure of the employees to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

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APPENDIX B

Pursuant to Rule 18.2(f) of the Rules of the Court:
(Numbers are to pages of the reporter's transcript)

Board Case Nos. 21-CA-6651
21-CB-2573

GENERAL COUNSEL'S EXHIBITS

<u>Number</u>	<u>Identified</u>	<u>Received</u>
1(a) – 1(m)	13	13
2	20	23
3	41	42
4	44	45
5	46	46
6	47	47
7(a)	102	102
7(b)	102	102
8(a)	106	106
8(b)	106	106
9	106	109

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

WESTERN BUILDING MAINTENANCE COMPANY AND
SERVICE AND MAINTENANCE EMPLOYEES UNION
LOCAL 399, BUILDING SERVICE EMPLOYEES INTER-
NATIONAL UNION, AFL-CIO,

Respondents.

BRIEF OF WESTERN BUILDING MAINTENANCE COMPANY.

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FILED

MAY 31 1968

JWM. B. LUCK CLERK

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TABLE OF AUTHORITIES CITED

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No. 22,423

IN THE

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FOR THE NINTH CIRCUIT

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SERVICE AND MAINTENANCE EMPLOYEES UNION
LOCAL 399, BUILDING SERVICE EMPLOYEES INTER-
NATIONAL UNION, AFL-CIO,

Respondents.

BRIEF OF WESTERN BUILDING MAINTENANCE COMPANY.

STATEMENT OF THE CASE.

I.

Background.

Respondent Western Building Maintenance Company (hereinafter called "Western"), and all of the Parties in Interest named in the original Complaint, are employers of employees in the building maintenance business. Respondent Service and Maintenance Employees Union, Local 399, Building Service Employees International Union, AFL-CIO (hereinafter called "Union") represents building maintenance employees in the Southern California area. The employers are all party to iden-

tical industry-wide collective bargaining agreements with the Union. The collective bargaining agreement in effect between Western and the Union during the time in issue was operative from August, 1963 to August, 1966 [G.C. Ex. 3].¹ The agreement contained union-security provisions, including a requirement that employees join the Union and pay dues, which collective bargaining agreement language was as follows:

“ARTICLE III — HIRING AND EMPLOYMENT

Section 1. Union security

A. It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall remain members in good standing. It shall be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall, on or immediately after the thirtieth day following the beginning of such employment or thirty days after the effective date of this Agreement, whichever is later, become and remain members in good standing of the Union.

B. The Employer shall inform all employees, at the time of hire, who come under the scope of this Agreement of the existence and terms of this Agreement, and the obligations of such employees as to Union membership.

* * *

¹All references conform to the Board's method of designation.

“ARTICLE IV—CHECK OFF

Section 1. Payment of Membership Initiation and Dues

A. The Employer agrees to a check-off for the payment of Union dues and initiation fees and to deduct such payments from the wages of all employees and remit same to the Union in accordance with the terms of signed authorizations of such employees, and according to the method set forth below, and the Employer shall be the agent for receiving such monies and the deduction of said dues by the Employer shall constitute payment of said dues by the employees.” [G.C. Ex. 3].

These union security provisions were conceded to be valid and are not in issue [R. 65, 73].

The Board found that Western unlawfully implemented the provisions of the collective bargaining agreement by requiring that, as a condition of employment, its newly hired employees join the Union and pay dues prior to thirty (30) days after the beginning of their employment. Western denies that the Board’s finding is supported by substantial evidence upon the record considered as a whole and contends that its only activities were those lawfully required of it to implement the lawful union security clauses contained in its collective bargaining agreement with the Union.

II.

Western's Hiring Practices.

Prospective employees of Western were customarily interviewed initially by a receptionist. If the applicant passed this initial screening, he was then interviewed by any one of seven supervisors. If accepted for employment, the applicant was given an employment package, consisting of a withholding exemption certificate, application for membership in the Union, payroll deduction authorization card, designation of beneficiary, application for employment and personnel check sheet. During the interview, the employee was advised that Western was a union company and that membership in the Union and payment of union dues was required as a condition of employment. Nothing was normally stated as to the time in which the applicant had to join the Union or commence to pay union dues. The new employee was required to return all of the documents in the employment package, filled out and signed, as soon as possible. An employee who had joined the Union would not be paid unless he returned at least the withholding exemption and payroll deduction authorization.² Generally, an applicant who had joined the Un-

²There is a seeming contradiction in the stipulated facts since on the one hand it is stated that as a condition to receiving their first paycheck, a newly hired employee was required to have turned in a withholding exemption certificate and payroll deduction authorization. On the other hand, it was stipulated that some employees refused to sign the authorization cards or join the Union in the thirty (30) day period and were nevertheless continued in employment. It was further stipulated that no dues were deducted without a payroll deduction authorization first having been signed. The only way to interpret these stipu-

ion completed and returned all of the forms immediately. There is no evidence that any coercive measures were applied if the new employees failed to join the Union and pay dues within the thirty (30) day period. In fact some new employees of Western refused to sign the application for membership and payroll deduction authorization. They were nevertheless employed and continued in Western's employ until after their first thirty (30) days of employment, at which time they were then required to join the Union. No dues were deducted from such employees during the thirty (30) day period [G.C. Exs. 8 and 9; Tr. 107-108].

lated facts consistently is to interpret them as meaning that if the new employee had joined the Union, a signed payroll deduction authorization was required before he received his first paycheck, in order to enable Western to lawfully deduct dues, but that if the new employee had decided not to join the Union, no payroll deduction authorization was required and he received his first paycheck at the normal payroll period.

ARGUMENT.

There Is No Substantial Evidence on the Record as a Whole to Support the Board's Findings That Western Required New Employees to Join the Union and Authorize the Checkoff of Dues as a Condition of Employment Prior to the Expiration of the Thirty (30) Day Period.

Section 8(b)(1)(A) forbids employers to restrain or coerce employees in the exercise of their Section 7 rights, including the right to refrain from joining unions, except under the provisions of Section 8(a)(3). The latter section permits an employer and a union representing a majority of its employees to “. . . require as a condition of employment membership therein (the union) on or after the thirtieth day following the beginning of such employment. . . .”

Under the lawful terms of its collective bargaining agreement, Western was required to advise applicants for employment, at the time of hire, of their obligation to join the Union. As a part of carrying out these duties under the lawful collective bargaining agreement, Western made available to new employees the documents needed to join the Union and authorize deduction of union dues. No coercion, threats or statements were made to express the requirement that such new employees were obligated to join the Union prior to the thirty (30) day period. As a general rule, most new employees promptly joined the Union. However, on occasion, new employees refused to join the Union prior to the expiration of the grace period. No coercive or retaliatory measures on the part of Western followed such a refusal. Such employees continued in their employment, unaffected by their refusal.

The absence of any prohibited coercion is emphasized when two cases dealing with the issue in question are analyzed and contrasted with the facts of this case. In *N.L.R.B. v. Cadillac Wire Corp.*, 290 F. 2d 261 (2nd Cir. 1961) new employees were given a union application containing a dues checkoff authorization upon being employed. The employees were then directed to the Shop Steward who advised them that they had to sign the card within a day or two. The court properly held that such action constituted non-permissible coercion. In *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583 (1966) the Board found that there was no unlawful coercion. The Board stated:

“In view of the lawful union-security and voluntary checkoff provisions of the applicable contract, we are unable to conclude on the record before us that the supervisors did more than merely advise employees of their contractual obligations to join the Union and of the availability of the checkoff as a method of paying lawfully required union dues.” 157 N.L.R.B. at 587.

The conduct in issue here amounts to no more than the approved conduct described in *Keller Plastics Eastern, Inc.*, *supra*.

Undeterred by the absence of any evidence to show physical, verbal or other forms of coercion or restraint on the part of Western, the Board sought to involve Western in illegal conduct by referring to various notices sent by the Union to the maintenance contractor employers, including Western. The Union has maintained that these notices were nothing more than an accurate amplification of the lawful procedures required

by the collective bargaining agreement. The Board interprets those notices as requiring unlawful procedures to be followed. But none of this is of any significance in assessing the lawfulness of Western's conduct. If Western's conduct is lawful, all of the notices sent to it, lawful or unlawful, cannot change that fact. The significance of this point is highlighted when the Board's dismissal of forty seven (47) of the original Parties in Interest is considered. Some were dismissed because of their failure to meet Board jurisdictional standards; but some were dismissed because of the absence of any evidence that they had engaged in the prohibited activity in issue [R. 62-63; Tr. 31-34, 101-102]. Since all of the dismissed employers received the same notice that Western received, the mere receipt of such notices can no more indict Western than did such receipt indict the dismissed employers.

In addition to the absence of any indirect or direct evidence of restraint or coercion, there is present positive evidence that the newly hired employees that did join the Union within the thirty (30) day period, did so voluntarily. Thus, the Union membership application forms expressly provided that such applications were voluntarily completed and submitted. These forms stated "I of my own free will, hereby apply for membership in the Service and Maintenance Employees Union, Local 399 of Los Angeles. . . ." The payroll deduction cards contained a similar provision that "I hereby certify that this authorization is made freely and without any interference, restraint or coercion from any person or persons whatsoever." It is unlikely that employees would sign a card containing such language if they believed they were being coerced into signing them.

At the very least, in the absence of any affirmative evidence of coercion, such expressions of free and voluntary assent to membership in the Union must carry substantial weight in assessing the lawfulness of Western's conduct.

Conclusion.

The Board has through unsupported innuendo and implication attempted to establish that Western coerced its newly hired employees to join the Union prior to passage of the statutory time. The evidence shows that no employee was coerced to join the Union and no new employee was subjected to any adverse treatment upon his failure to join the Union during the protected period. For these reasons it is respectfully submitted that no part of the Board's order directed to Western should be enforced.

COOPER, TEPPER & PLANT,

By LEON M. COOPER,

*Attorneys for Western Building
Maintenance Company.*

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

FOSTER TEPPER

APPENDIX A.

Pursuant to Rule 18.2(f) of the Rules of the Court:
(Numbers are to pages of the Reporter's Transcript.)

General Counsel's Exhibits

Number	Identified	Received
3	41	42
8a	106	106
8b	106	106
9	106	109

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

WESTERN BUILDING MAINTENANCE COMPANY AND
SERVICE AND MAINTENANCE EMPLOYEES UNION,
LOCAL 399, BUILDING SERVICE EMPLOYEES INTER-
NATIONAL UNION, AFL-CIO,

Respondents.

Brief for Respondent, Service and Maintenance
Employees Union, Local 399, Building Service
Employees International Union, AFL-CIO.

LEVY, DEROY, GEFFNER & VAN BOURG and
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MAY 31 1968

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No. 22,423

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

WESTERN BUILDING MAINTENANCE COMPANY AND
SERVICE AND MAINTENANCE EMPLOYEES UNION,
LOCAL 399, BUILDING SERVICE EMPLOYEES INTER-
NATIONAL UNION, AFL-CIO,

Respondents.

**Brief for Respondent, Service and Maintenance
Employees Union, Local 399, Building Service
Employees International Union, AFL-CIO.**

Statement of Facts.

A Complaint was issued by the Regional Director against Service and Maintenance Employees Union, Local 399, AFL-CIO, hereinafter called "Union," and the Western Building Maintenance Company, hereinafter called "Western Building," based on a charge filed by Anthony Doria, President of the Charging Party, International Union, Confederated Industrial Workers of America. The Complaint included as parties in interest sixty-three other maintenance companies. An Answer was filed by the Union and Western Building. Hearings were held on February 16 and 17, 1966, and March 10, 1966. The Trial Examiner issued a Decision on September 12, 1966, finding that the Union and West-

ern Building were in violation of the Act, and recommended a remedial order.

On January 10, 1967, the National Labor Relations Board, hereinafter referred to as the "Board," issued its Decision and Order. The Board adopted the findings, conclusions and recommendations of the Trial Examiner.

A. The Evidence Established at the Hearings Was, For the Most Part, Undisputed, and Consisted of Written Stipulations and the Testimony of One Witness.

The Union represents janitors, janitresses, and general custodian workers in the Southern California area. The Union and the sixty-three maintenance companies, originally named as parties in interest, as well as Western Building have been parties to a series of collective bargaining agreements going back many years. Each maintenance company was signed to the identical agreement that established uniform wages, hours and working conditions for employees working in this industry in the Southern California area. The Agreement that is the subject matter of the case was in effect from August 1963 to August 1966 [General Counsel's Ex. 3].

The Agreement contained a lawful Union security clause that required the employees to become members of the Union as a condition of employment after thirty (30) days of employment. All the parties stipulated, and the General Counsel did not challenge the legality of the Union security clause in the Agreement. The Board held that the Union security clause was a lawful provision.

The Board found that the Union and Western Building and the Employers that were not dismissed as parties

in interest, did restrain and coerce new employees upon their hiring, on a finding that there was a practice that each new hired employee was coerced and restrained to pay dues to the Union during the first thirty days of employment.

The General Counsel dismissed the Complaint as against forty-five of the sixty-three maintenance companies that were originally named as parties in interest. It was stipulated that the reason the General Counsel dismissed the complaint as to the forty-five maintenance companies was that such companies either did not meet the jurisdictional standards of the Board, or did not engage in any practice involving the collection and payment of dues by new employees during the first thirty (30) days of employment of new employees [Tr. p. 31].

The only testimony at the hearing was that of Mrs. Juliann Werle who was the Personnel Manager of American Building Maintenance Company [Tr. pp. 16-30]. The balance of the case was submitted on stipulations and exhibits.

There was a stipulation that the eighteen companies that remained in the case as parties in interest engaged in a wide variety of practices. The stipulation set forth that there were many different statements or no statements at all were made to new employees concerning Union membership and the signing of dues check-off cards and the collection of dues during the first thirty days of employment. The Union will discuss, at a later point in this brief, the differences in the practices which was entirely ignored by the Board in its decision that all of the companies and the Union engaged in practices that were in violation of the Act [General Counsel's Ex. 8].

ARGUMENT.

1. **The Board Was in Error in Finding That the General Counsel Had Sustained the Burden of Proof Required to Show That Any Conduct on the Part of the Union Was in Violation of the Act.**

There is no need to cite numerous authorities to the effect that in an unfair labor practice proceeding, the General Counsel has the burden of proving that the Respondent has committed an act or is engaged in any conduct that is in violation of the Act. The Union submits that the Board was in error in ignoring the amount of proof required and the burden that must be sustained by the General Counsel. The decision of the Board, in effect, shifts the burden of proof to the union and is based on speculation and deductions that are not based on any evidence in the record. Specifically, the Board reached a general conclusion as to a pattern of conduct by the Union based on stipulations in the record and ignored the fact that the practices between the various employers differed drastically and the Board completely failed to draw a distinction between the various practices engaged in by the various Employers. The Board, in effect, took the practices of one or two employers and ignored the practices of the other employers and from the practices of one or two employers, reached a general conclusion that the Union had engaged in conduct in violation of the Act. Such a method of reasoning, the Union submits, does not sustain the burden of proof that is required.

The only evidence in the record that in any way relates to any conduct on the part of the Union consists of the two notices sent by the Union to all of the main-

tenance contractors [General Counsel's Exs. 4 and 5], and some general stipulations that statements and audits were made to the effect that the dues were twenty-five cents per day [Counsel's General Ex. "A"].

The notices sent by the Union merely rephrased the language of the applicable Agreement which the General Counsel conceded and the Board specifically found contained a lawful Union security clause. The notices by its language do not contain any demands or statements of policy that a new employee should not be hired unless the employee agreed to pay Union dues during the first thirty days of employment. The law is very clear, and there is no doubt that an employee can voluntarily agree to join the Union at the time of hire and pay dues during the first thirty days of employment. A violation of the Act would exist only if a new employee was coerced or threatened to the effect that he is told that as a condition of employment, he must pay Union dues during the first thirty days and that if he did not agree to pay such dues, he would not be hired by the employer. There is nothing in the language of the notices sent by the Union that in any way consists of the type of demands or conduct that is required to prove a violation of the Act to the effect that the Union insisted and required the employer to set forth as a condition of hire that the employee must join the Union and pay Union dues during the first thirty days of employment.

The stipulation [General Counsel's Ex. 8] sets forth that representatives of the Union did speak to four employers reminding them that dues for the first thirty days of employment were twenty-five cents per day. The fact that the Union did remind several employers

of the exact amount of dues is not proof that the Union coerced, insisted or demanded that an employee should not be hired unless the employee agreed to pay Union dues during the first thirty days of employment. The Union has a right to set forth dues and to accept such dues for an employee who joins the Union at the time of his hire or before the end of the thirty-day period and signs a dues check-off authorization card. The fact that the Union accepted such dues is not sufficient proof to sustain a finding and to satisfy the burden of proof that the Union engaged in any illegal conduct to obtain such dues.

The stipulation [General Counsel's Ex. 8] sets forth in great detail that there were various and different practices by eighteen out of the sixty-four maintenance employers that were signed to the Standard Maintenance Agreement and who received the identical notices from the Union. In most instances, the employers did not say anything to the new employees. Any statements made upon hiring of new employees were, for the most part, vague, general and varied substantially between the employers. It is important to point out that the General Counsel did not offer any substantial evidence and the Board was not able to base its findings on any substantial evidence that the Union was responsible for any of the ambiguous and general statements made by a few employers upon hiring new employees. The Board found the Union in a violation of the Act based solely on speculation and conclusions drawn from the conduct of other parties and from a general suspicion that the Union may have engaged in such illegal conduct. However, the Courts should not uphold a finding of a violation of the Act

based upon speculation which is not supported by substantial evidence.

The Ninth Circuit Court of Appeals in *National Labor Relations Board v. Meatcutters Local Union*, 202 F. 2d 671, refused to enforce an order of the Board finding that a Union had discriminated against an employee in violation of Section 8(b)(2) of the Act. The Court stated that the Board's Order was not supported by sufficient evidence and the Board cannot arrive at any conclusion based only on hearsay and speculation. The Court, in this regard, stated as follows:

“Notwithstanding this want of anything but hearsay to support this particular portion of the Complaint against the Union, the trial examiner arrived at his conclusion by saying: ‘However, the circumstances set forth in the evidence establish in the case E. A. Wyatt Gearhart *must have been told* by the Union that the Union objected to the continuation of Wyatt's Employment.’ (Emphasis Added) The Board is not permitted to arrive at conclusions based on such speculations.”

In *National Labor Relations Board v. Thomas Rigging Co.*, 211 F. 2d 153, the Court refused to enforce an order against a Union based on a finding of the Board that the Union had discriminated against employees in violation of the Act, as the Board's Order was not supported by sufficient evidence. In this regard, the Court stated as follows:

“We do not lose sight of the fact that we should not substitute our judgment for that of the Board as to the credibility of witnesses or reasonable in-

ferences drawn from the testimony, but we are functioning within our proper sphere when we say that mere speculation is not sufficient to uphold a finding of an unfair labor practice.

The United States Supreme Court has, on several occasions, cautioned the Board that the Board cannot find a violation of the Act concerning discrimination in hiring unless there is substantial evidence to support the order. In *Local 357, Teamsters v. National Labor Relations Board*, 365 U.S. 667, 47 LRRM 2909, and *National Labor Relations Board v. News Syndicate Co.*, 365 U.S. 695, the Supreme Court held that discrimination by a Union cannot be inferred without evidence establishing such a fact and the Board cannot reach conclusions based on speculation only.

2. The Fact That Only Nineteen (19) Out of Sixty-Four (64) Employers Are Involved Required a Finding That the Union Did Not Cause the Employers to Require New Employees to Pay Dues During the First Thirty (30) Days of Employment as the Agreement and Notices and Practices Are on an Industry-Wide Basis.

If the Union did participate and require the employers under the Agreement to require as a condition of hiring, the payment of Union dues during the first thirty days of employment, then it is strange that out of the sixty-four employers, only nineteen are alleged to have engaged in violating the Act. It is true that some of the companies were dismissed because of lack of jurisdiction; however, many of the companies did meet the jurisdictional standards of the Board, but did not collect any dues during the first thirty days of

employment. If the Union intended a violation of the Act by the notices and the alleged practice, it is curious that the Union did not enforce its demands as against all the employers that are signed to the Agreement. The Union had the right under the Agreement to strike, file a lawsuit, or proceed to arbitration against any employer that the Union claimed was in violation of the Agreement. If the Union intended a practice of requiring the payment of such dues, the Union would have taken some action against the employers that did not collect such dues. The fact that the Union did not proceed against such employers and the fact that so many employers did not collect such dues, supports a finding that the Union cannot be responsible for the fact that some employees did pay dues during the first thirty days of their employment. The Union had a right to assume that coercion was not exercised by any employer.

The Trial Examiner, in his decision (p. 20, lines 20-35), dismisses this point on the basis that there was proof concerning the nineteen employers and what practice existed concerning the other forty-five maintenance contractors is not relevant. However, the Trial Examiner devotes a considerable portion of his decision attempting to show a wide-spread practice and custom by the Union in order to find some proof of coercion or restraint. In the absence of specific evidence, the Trial Examiner was forced to rely on a conclusion based on a custom or practice. If a custom or practice is to be used as a basis for a finding of illegal conduct, then the Trial Examiner should have used the custom and practices of the entire industry and involve all of the employers that were signed to the identical agreement. The Union submits that when a practice is legal, at least as to forty-five employers, that a find-

ing of illegal conduct cannot be based upon speculation involving the remaining nineteen employers, and that the overall practice is relevant in determining the motivation's and the intentions of the Union in its conduct. A reasonable and substantial conclusion that can be drawn from the testimony is that the Union did not engage in illegal conduct based on the fact that if the Union tended to coerce or restrain the new employees then such restraint or coercion would apply as against all of the employers that were signed to the identical Agreement. There is no evidence in the record nor any basis for any finding as to why the Union would select less than a majority of the maintenance contractors, specifically nineteen out of forty-five employers, to develop any illegal conduct.

3. The Stipulation Sets Forth That There Was a Difference in Practice Between the Employers That Are Parties in Interest.

Paragraph 2 of the Stipulation [General Counsel's Ex. 8] sets forth that some employers told job applicants that in order to be employed they must join Local 399 and pay Union dues. This statement alone is not coercive or threatening as the Agreement did provide for a legal Union shop and that employees would have to join the Union after thirty days and pay dues. This statement does not contain any evidence that new applicants were told that they must join upon hiring and pay dues during the first thirty days of employment.

The Employers specified in paragraph 3 of the Stipulation [General Counsel's Ex. 8] did not state when the employees had to join the Union or when dues would be taken out of the employees pay or the amount of

the dues. The Employers cannot be held to have coerced new employees in any manner by such statements.

All-State Building told its new employees that they did not have to join the Union until after thirty days and that no dues would be deducted during the first thirty days of employment [General Counsel's Ex. 8, par. 4]. This statement clearly shows that this employer did not violate the Act and, in fact, correctly advised its new employees.

Royal Building Maintenance informed its job applicants that in order to become employed they must join the Union, but no dues would be deducted until after 30 days of employment. Again, this statement to new applicants was legal and proper and doesn't prove a violation of the Act.

In fact, there is no statement by any employer, except Coast Building, that any dues would be deducted during the first thirty days of employment. The fact that the employer may have given forms to sign cannot alone support a finding of illegal conduct.

It is important to point out that Western Building did hire new employees, although such employees refused to join the Union or pay any dues until after thirty days of employment. The practice of hiring such new employees even though such employees decided not to join the Union until after thirty days is clear proof that Western Building and the Union did not coerce or require a new employee to join the Union and pay dues during the first thirty days of employment as a condition of hiring.

Based on the record, there is no evidence that in any way will support a conclusion that any of the

employers acted in violation of the Act and consequently if such employers did not engage in any illegal practices, the Union cannot be held liable. On the contrary, the evidence establishes that the employers merely handed the forms to new applicants without any coercive statements.

All-State specifically told its applicants they did not have to join the Union until after thirty days and no dues would be deducted during the first thirty days.

Coast Building told its job applicants that they had thirty days to join the Union.

Royal Building told its job applicants that no dues would be deducted until after thirty days of employment.

All American, Esquire, Los Angeles and Nielson did not say anything to job applicants at the time of hiring and only distributed the forms after thirty days.

Western Building, by its hiring of applicants who refused to sign any forms, establishes that Western did not condition hiring upon the signing of such forms.

Other employers, engaged in the practice of not saying anything to its job applicants, but merely gave each applicant the forms.

There is no illegal conduct involved when an employer tells its new employees that the contract with the Union contains a Union shop and that the employees will have to join the Union. The General Counsel in order to prove his case, must show by affirmative and substantial evidence that the employer and the Union required a new applicant to join the Union at the time of hire and pay dues during the first thirty days of employment. Such substantial evidence has not been presented in this case.

The Trial Examiner, in the decision starting at page 14, line 40, and through page 15, and page 16 up through line 10, sets forth the differences in practices concerning the nineteen maintenance contractors that were set forth in the stipulation [General Counsel's Ex. 8]. The Trial Examiner totally ignores the differences in practices, and fails to distinguish between the practices of the various employers. It is possible, although the Union does not concede it, that some of the employers may have made some statements that conditioned employment upon joining the Union and paying dues within the first thirty days. However, there is no doubt that some of the employers clearly did not coerce or restrain their new employees, and that new employees were hired and did work even though they did not pay Union dues and did not join the Union and were in no way coerced or required to join the Union during the first thirty days. The Board's decision totally fails to distinguish between the employers as to their various practices. Instead, the Trial Examiner merely adopts the conclusion of the General Counsel which has no basis in the record, and states "As the General Counsel asserts in his brief, it is difficult to conceive of conduct more coercive than the imposition as a condition of employment of a requirement of Union membership and the signing of a check-off, during the first thirty days of employment, even where a lawful Union security provision is in effect." The Trial Examiner and the Board reach the conclusion that the conduct contained an imposition as a condition of employment, but does not set forth the facts to support such a conclusion.

4. The Applications for Membership and Dues Check-Off Cards Signed by New Hires Contains Clear Language That the Applicants Signed of Their Own Free Will.

The forms submitted to new employees contained an application card for membership in the Union and a payroll deduction authorization card. The application for membership card states "I, of my own free will, hereby apply for membership in the Service and Maintenance Employees Union, Local 399 of Los Angeles . . ." The payroll deduction authorization card states. "I hereby certify that this authorization is made freely and without any inference, restraint or coercion from any person or persons whatsoever."

It must be assumed, that a new applicant, when he signed a card, read the card and understood what he was signing. The General Counsel attempted to show that the educational level of such employees were low and that such new employees were not capable of reading or understanding what they signed. Such a conclusion cannot be made from the evidence. There was no testimony presented that any employee was not capable of reading or understanding what he signed. In the absence of specific testimony, the only inference that can be drawn is that an adult who signs a card is able to read and understand what he signs. For this reason, the application for Union membership and the payment of dues was a voluntary act on the part of each new employee.

The Board dismisses this point on the basis that the Union did not make any showing "that any of the newly hired employees read these forms before signing them, and, and in view of the fact that they were told that employment was contingent upon their signing the forms, it is wholly unrealistic to believe that the employees would have been deterred from signing by the self-serving statement placed there by the Union." (Trial Examiner's Decision, page 17, lines 35-40). This statement of the Trial Examiner again shows that the Trial Examiner is not basing his conclusions on any substantial evidence in the record. This statement, as quoted above, is based on a conclusion "in view of the fact that they were told that employment was contingent upon their signing the forms . . ." which is the conclusion urged by the General Counsel, but is totally lacking in evidence in the record. Another error by the Board in adopting the Trial Examiner's Findings is that the Trial Examiner apparently adopted the unusual position of requiring that the Union had the burden of proving that newly hired employees read the forms that were presented to them. The stipulation submitted that the language to the effect that the signing of the cards was voluntary, was clearly legible on the card and was in simple and understandable English. It can only be assumed that when a card contains language which is clear and in English, that a person signing such a card has read and understood the language. Instead, the Board would have the Union sustain the burden of proof of showing that the many

hundreds of new applicants that were hired failed to read the card or failed to understand what was on the card.

In *National Labor Relations Board v. Englander Co.*, 260 F. 2d 67, the Ninth Circuit refused to enforce an Order of the Board, in part, relating to hiring and the joining of a Union until after thirty-one days of employment. In this regard the Court stated as follows:

“The Union agreement which had been theretofore on February 15th or 16th entered into between Englander and the Teamsters contained a security-clause which required all employees to join the Union after 31 days employment. Taking this conversation at its face value (although denied by Moore), the conversation would just as reasonably have referred to the requirement of the security clause to join the Teamsters *after* 31 days employment as the construction placed on it by the Board that it required joining the Teamsters *before* the employment. If it had the former construction, it was of course perfectly legitimate under the security clause.”

The Board, in *Jomare Metal Finishing*, 147 N.L.R.B. 129, refused to grant the General Counsel a general reimbursement of dues remedy on the basis that the record was devoid of any facts or evidence that employees were coerced to join the Union or sign check-off authorization cards.

In *S. Klein Department Stores*, 149 N.L.R.B. 49, the Board held that an employer had a right to advise his employees that a contract with a labor organization, requires them to join the Union pursuant to a Union security clause.

The Board relies heavily on the case of *Campbell Soup Co.*, 152 N.L.R.B. 165 and the decision of the Ninth Circuit where the Board order was enforced. See *N.L.R.B. v. Campbell Soup Co. and Butcher's Union, Local 127, Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO*, 378 F. 2d 259 (C. A. 9), cert denied, 389 U. S. 900.

The Ninth Circuit, in the *Campbell Soup* case, enforced the Board's order based on issues that are not involved in the present case. The attack on the Board order in the *Campbell Soup Company* case was based on a decision of the Board where the Board did not give effect to a settlement agreement and, in addition, the Ninth Circuit Court rejected the employer's attack on the Board's order where the Board found the employer jointly liable with the Union regarding the remedy. Neither of these two issues are present in this case. However, an analysis of the facts and the findings in the *Campbell Soup* case by the Board regarding the findings of violations of 8(b)(2) and 8(a)(2) and (3) of the Act are applicable here. The Union submits that there are substantial differences between the facts and the practices in the present case, and the situation in the *Campbell Soup Company* case. In the *Campbell Soup Co.* case, the Board found, by substantial evidence which only involved one company and one personnel practice, that each new hire was told by the personnel manager that they must join the Union and pay dues during the first thirty days of employment. The testimony established that this was the practice of the company and that such statements were clearly made by the employer and that such statements were made upon the instructions and cooperation with

the Union. There was additional testimony in the record that the employees who were hired understood that they had to join and pay dues during the first thirty days as a condition of employment. Another important factor is that the practice was successful to the extent that virtually every new employee that was hired did join the Union and pay dues during the first thirty days of employment. It is clear that the type and amount of evidence that existed in the *Campbell Soup Co.* case is far different than the proof offered in this case. In this case, there was a specific provision in the cards signed by new applicants that such persons were signing voluntarily and of their own choice. Again, there was a vague, general and different types of statement made by each of the employers. Another important distinction is that the collection of dues was virtually one hundred per cent during the first thirty days of employment in the *Campbell Soup Co.* case. As pointed out, in this case, based on over sixty employers, the practice was not only not successful, but was almost entirely unsuccessful if such a practice did exist. The evidence in this case is clear that only nineteen out of sixty-three employers are still parties in interest, and between the nineteen employers, the practice was "so widely different so as to completely refute any wide-spread practice of illegal conduct on the part of the Union.

The present case is similar to *Philide Sherate Corp.* 136 N.L.R.B. 75, and LRRM 1874. Even if some of the employers did engage in coercive conduct, the Union

was not a party to such conduct. In the absence of proof, the Union cannot be held responsible for some general and vague statements that may have been made by an employer upon hiring new applicants.

In *Keller Plastics Inc.*, 157 N.L.R.B. 55, 61 LRRM 1397, the Board states as follows:

“As to the allegation regarding supervisory solicitation of employees to sign Union authorization and dues checkoff cards, the stipulated facts do not establish that supervisors engaged in such solicitation in a coercive or otherwise unlawful manner, or that employees were advised that they must join the Union before their 30-day grace period had expired. In view of the lawful union-security and voluntary checkoff provisions of the applicable contract, we are unable to conclude on the record before us that the supervisors did more than merely advise employees of their contractual obligations to join the Union and of the availability of the checkoff as a method of paying lawfully required union dues. We therefore find no adequate support for the alleged violations of Section 8(a)(1), (2), or (3) of the Act, based on the aforesaid solicitation.”

The Trial Examiner, in his recommended Order, and adopted by the Board refers to the check-off authorization cards. The General Counsel did not challenge the check-off cards and provisions and, in view of the fact that the employees remained in employment past thirty days, there is no basis for a finding of fact concerning the future use of such check-off authorization cards.

Conclusion.

For the reasons stated, it is respectfully submitted that the Board's order should not be enforced.

LEVY, DERoy, GEFFNER & VAN BOURG and
LEO GEFFNER,

By LEO GEFFNER,

*Attorneys for Respondent, Service and
Maintenance Employees Union, Local
399, Building Service Employees In-
ternational Union, AFL-CIO.*

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEO GEFFNER.

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

WILLIAM A. MAGELLAN, JOSEPH S. MARTINAC,
FREDERICK T. BOROVICH, G. E. SKEWIS,
EUGENE DAHOUT, AND J. M. MARTINAC

SHIPBUILDING CORPORATION, d/b/a M.V. EASTERN PACIFIC;

and

FISHERMEN'S UNION LOCAL 33, INTERNATIONAL
LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,

Respondents.

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

MAR 4 1968

WM. B. LUCK, CLERK

MAR 11 1968

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,425

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

WILLIAM A. MAGELLAN, JOSEPH S. MARTINAC,
FREDERICK T. BOROVICH, G. E. SKEWIS,
EUGENE DAHOUT, AND J. M. MARTINAC

SHIPBUILDING CORPORATION, d/b/a M.V. EASTERN PACIFIC;

and

FISHERMEN'S UNION LOCAL 33, INTERNATIONAL
LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,

Respondents.

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat.

519, 29 U.S.C., Secs. 151, *et seq.*),¹ for enforcement of its order (R. 64-65, 24-48)² issued on March 31, 1967, against respondent (hereafter referred to as the "Employer" and Local 33). The Board's Decision and Order are reported at 163 NLRB No. 110. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred within this judicial circuit.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Employer violated Section 8(a)(1), (2) and (3) of the Act by recognizing and entering into a contract with Local 33 while there existed a question concerning representation, by unlawfully assisting Local 33 prior thereto, and by enforcing and maintaining the contract which contained a union security clause. The Board also found that Local 33, by demanding and accepting said contract from the Employer under these circumstances, and by enforcing and maintaining the contract with a union security

¹ The pertinent statutory provisions are reprinted in Appendix A, *infra*, pp. A-1 to A-5.

² References to the pleadings and decision and order of the Board, the Trial Examiner's recommended decision and order and other papers reproduced as Volume 1, pleadings, are designated "R." References to portions of the stenographic transcript reproduced pursuant to the Rules of this Court are designated "Tr." "G.C. Ex." refers to the General Counsel's exhibits, "R. Union Ex." refers to respondent union's exhibits. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

clause, violated Section 8(b)(1)(A) and (2) of the Act. The facts upon which the Board based its findings are summarized below.

A. Background

William Magellan, and the other named respondents, are co-owners³ and operators of the fishing vessel EASTERN PACIFIC which is engaged in tuna fishing on the high seas between Mexico and Chile (R. 25; Tr. 12-13). Magellan was the captain of the EASTERN PACIFIC and was in charge of hiring the crew (R. 26; Tr. 14-15). The EASTERN PACIFIC sailed on its maiden voyage on August 12, 1965 (Tr. 14).

While the EASTERN PACIFIC was being constructed, Magellan captained several other fishing vessels. Until May 1964 he was skipper of the SOUTHERN PACIFIC. When Magellan left the SOUTHERN PACIFIC he told the crew that they would be welcome to jobs on the EASTERN PACIFIC. Eight or nine of these men eventually became members of the EASTERN PACIFIC's first crew of eleven (R. 26; Tr. 18-20, 224). The SOUTHERN PACIFIC had a labor contract with Seine and Line Fishermen's Union of San Pedro, a union unrelated to the two unions here involved (R. 26; Tr. 22-23, 217).

After leaving the SOUTHERN PACIFIC, Magellan skippered the COIMBRA, which was under contract to Cannery

³ The owners' interests in the EASTERN PACIFIC are as follows: Martinac 40%; Magellan 25%; Borovich 20%; Skewis 5%; Dahout 5%; Martinac Shipbuilding Co. 5% (R. 26; Tr. 262).

Workers & Fishermen's Union of San Diego, AFL-CIO ("Cannery Workers"), which filed the instant unfair labor practice charges (R. 26; Tr. 218, 220). Thereafter, Magellan skippered the ANTOINETTE B, which was under contract to Local 33 (R. 27; Tr. 137-138). When he left that vessel, Magellan told the men — many of whom were with Magellan on the SOUTHERN PACIFIC — that they were welcome to sail on the EASTERN PACIFIC, which would be sailing soon. Eight of these men became part of the EASTERN PACIFIC's first crew (R. 27, 45; Tr. 225-226).

**B. The Cannery Workers' discussions with Magellan
concerning a contract covering the
crew of the EASTERN PACIFIC**

Between March and August 1965, several representatives of the Cannery Workers talked with Magellan on numerous occasions, and with co-owner Martinac on a few occasions, with respect to signing a contract with the Cannery Workers covering the crew of the EASTERN PACIFIC. These representatives were Jack Tarantino, vice president (Tr. 48); Joseph Silva, business agent (Tr. 64); Carl Marino, fish inspector and organizer (Tr. 74); and Lester Balinger, executive secretary and treasurer (Tr. 92). Magellan told Tarantino in early March that the crew of the EASTERN PACIFIC would be principally the crew of the ANTOINETTE B. In fact, the crew of the ANTOINETTE B had called Tarantino on board and told him they wanted to be covered on the EASTERN PACIFIC by the Cannery Workers' insurance rather than receive the benefits offered by Local 33. Magellan was aware of the crew's wishes in this respect (Tr. 136-138).

In his discussions with Cannery Workers' officials, Magellan told them that the Cannery Workers "had the crew" and would get a contract when the time was right (R. 30; Tr. 49-59, 69-71, 75-82, 95-96). For example, in April, Magellan told Tarantino: "Don't worry. The crew belongs to you guys. When it is time, we will get together" (R. 32; Tr. 53). Magellan reiterated this to Tarantino on several occasions before and after May 10 (R. 32; Tr. 52, 54, 56, 59). In March, Magellan also told Martino, in regard to signing a contract with Cannery Workers: "Well, don't worry about it. The boat is not yet ready. You have nothing to worry about. You have all the crew from San Diego on it" (R. 33; Tr. 77). Again, in June, when Marino asked about a rumor of a meeting between Magellan and Local 33, Magellan said that he shouldn't worry, that when the boat was ready they would "talk about it" (R. 33; Tr. 82). Also in June, Magellan had a discussion with Balinger about signing a contract. Magellan told Balinger: "Let us don't worry about a thing. You got all the guys aboard the boat. When the boat gets down here we will sit down and negotiate an agreement. Don't worry about a thing" (R. 33; Tr. 94-95).⁴

⁴ At the hearing, Magellan admitted that he told both Balinger and Tarantino that he would sign a contract with the Cannery Workers (R. 34; Tr. 251, 256).

C. The practice of multiple union membership in the industry

Crew members of fishing vessels often work on different vessels, which may be under contract with one of at least three different unions. Thus, as shown, the SOUTHERN PACIFIC, the COIMBRA, and the ANTOINETTE B, the three vessels Magellan skippered prior to the EASTERN PACIFIC, each had contracts with a different union. Since contracts in the industry commonly contain union-security clauses, many employees retain membership in two or more unions at the same time (R. 36; Tr. 124, 163).

Cannery Workers has a \$125 initiation fee, a \$1.00 monthly fee to remain in good standing, and a discretionary \$125 reinstatement fee. Continuing membership rights include death benefits, emergency fund benefits, a health and welfare program, and the ability to file unemployment compensation claims through the Cannery Workers under California Unemployment Compensation Law procedure (R. 36; Tr. 73, 121-122, 133).

Under the Cannery Workers bylaws a member remains in good standing until he is six months delinquent in dues payments, at which time he is automatically expelled (R. 36; Tr. 114). When the eleven-man crew of the EASTERN PACIFIC was hired on May 3, 1965, eight of them were members in good standing of the Cannery Workers: two of them were fully current in the payment of dues, three were paid up through March 31, and three paid up through December 31, 1964. A ninth member of the eleven-man crew had been a member, but had not paid dues for over six months (R. 37, 46; Tr. 107-117).

**D. The crew members of the EASTERN PACIFIC
sign up with Local 33; Magellan agrees to,
and then signs, a contract with Local 33**

The launching of the EASTERN PACIFIC took place on April 14, 1965, and representatives of both Local 33 and the Cannery Workers were invited (R. 5; Tr. 46, 65). As set forth above, the crew was hired on May 3 (R. 28; Tr. 16-17, 42-43, 215). That same day, Rudy Crnko, a representative of Local 33, appeared at the room where work on the nets had already begun. Crnko asked Magellan if he could talk to the men. Crnko was told he could do so during lunch. At lunchtime Magellan called the men into a group and introduced Crnko as "the big shot from the I.L.W.U.," referring to Local 33's parent body. Crnko spoke to the men for about an hour, including a question-and-answer period. When Crnko had concluded, the men asked Magellan what he thought. Magellan replied that it made no difference to him but that he "did prefer" the I.L.W.U. (R. 28; Tr. 226-229, 271-272, 279-281). Magellan then stood within two feet of the men as eight of them signed a statement authorizing Local 33 to represent them (R. 29; Tr. 230-231, 268-271, R. Union Ex. 1).⁵ After the men signed, Magellan reiterated his preference for Local 33 (Tr. 236).

⁵ The parties stipulated as follows: Concerning the voluntariness of these signatures on Respondent Union's Exhibit 1, it is stipulated that the only issues to be litigated here are the effect of Mr. Magellan's statement of preference before these signatures were affixed to the document on May 3, 1965, and his physical presence in the room at a distance close enough to observe the act of signing and to be observed by the signers, and that otherwise no inference will be drawn or urged concerning his physical proximity to the signers (R. 29; Tr. 303-304).

On Sunday, May 4, John Royal, secretary-treasurer of Local 13, and Vangelias flew from Los Angeles to Tacoma, Washington. They met there with co-owner Warriner to discuss a form contract to cover the crew of the *LASTERA PALLER*. Certain changes were made in the contract and they discussed the possibility of substituting Blue Shield coverage for the health and welfare plan in the form contract. It was agreed that this would be done, if possible; otherwise the coverage would be as originally set forth. The contract contained a union-security provision regarding union membership after 30 days of employment (R. 19, T. 144-145, 501-502, C.C. Ex. 4).

On May 10 the parties agreed that they would prepare and sign the contract agreed upon within two weeks. Due to illness in Royal's family, the written agreement, which contained the health and welfare clause originally proposed, was not signed until June 19 (R. 19, T. 144-145, 502, C.C. Ex. 4).

4. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Employer violated Section 8(a)(1), (2) and (3) of the Act by reorganizing and entering into a contract with Local 13 while there existed a question concerning representation, by unlawfully assisting Local 13 since its birth, and by enforcing and maintaining the contract which contained a union security clause. The Board also found that Local 13 violated Section 8(b)(1), (4) and (2) of the Act by demanding and accepting said contract from the Employer under these circumstances, and by enforcing and maintaining the contract with a union security clause (R. 19,

The Board's order directs the Employer to cease and desist from recognizing or contracting with Local 33 as the statutory representative of the crew of the EASTERN PACIFIC until certified by the Board, from enforcing or maintaining the contract entered into on June 19, 1965, with Local 33 unless and until Local 33 is certified by the Board, and from in any like or related manner interfering with, restraining or coercing the crew members of the EASTERN PACIFIC in the exercise of their Section 7 rights. Affirmatively, the Employer is to withdraw and withhold all recognition from Local 33 until it is certified, and to post the appropriate notices (R. 20).

The Board order directs Local 33 to cease and desist from demanding or accepting recognition from or contracting with the Employer unless and until it is certified, from enforcing or maintaining its collective contract with the Employer until it is certified, and from in any like or related manner restraining or coercing crew members of the EASTERN PACIFIC in the exercise of their Section 7 rights. Affirmatively, Local 33 is required to post the appropriate notices (R. 21).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE EMPLOYER AND LOCAL 33 VIOLATED, RESPECTIVELY, SECTION 8 (a) (1), (2) AND (3) AND 8 (b) (1) (A) AND (2) OF THE ACT BY ENTERING INTO A COLLECTIVE BARGAINING AGREEMENT AT A TIME WHEN A REAL QUESTION CONCERNING REPRESENTATION EXISTED

As shown in the Statement, Cannery Workers and Local 33 were both seeking a contract to cover the Employer's

newly-constructed tuna vessel, the EASTERN PACIFIC. In early March 1965, before the EASTERN PACIFIC was completed, William Magellan, co-owner and captain-to-be of the EASTERN PACIFIC, told Tarantino, vice-president of the Cannery Workers, that the crew of the EASTERN PACIFIC would consist primarily of Magellan's present crew on ANTOINETTE B and that the men wanted to be in the Cannery Workers' insurance group. Thus, although the members of the ANTOINETTE B's crew were currently covered by a contract with Local 33, they called Tarantino on board and told him that they wanted to be covered by the Cannery Workers when they signed on the EASTERN PACIFIC. Thereafter, representatives of the Cannery Workers repeatedly checked with Magellan while the EASTERN PACIFIC was being constructed. The representatives reiterated that the crew of the new vessel expected to be covered by the Cannery Workers. Magellan consistently replied that he knew that the Cannery Workers "had the men" who would be on the EASTERN PACIFIC, and that it would get a contract when the time was right. The crew was hired and work began on the nets on May 3, 1965. Of the eleven crewmen, eight were members in good standing of the Cannery Workers, a fact known by Magellan as he himself was currently a member of that union (Tr. 70, 89-90, 215).

The Employer, therefore, had acknowledged the legitimacy of the Cannery Workers' representational interests in the EASTERN PACIFIC's crew, and on May 3 had knowingly engaged a crew comprised of a wide majority of Cannery Workers' members. On that date, however, Rudy Crnko, a representative of Local 33, appeared and asked Magellan if he could talk to the men. At lunchtime Magellan called the men

together and introduced Crnko as “the big shot from the I.L.W.U. [Local 33].” Crnko spoke for an hour and when he concluded, the men asked Magellan what he thought. Magellan, though adverting to his alleged indifference, stated that he “did prefer” Local 33. Then, as Magellan stood some two feet away, Crnko successfully obtained eight signatures on a statement which authorized Local 33 to represent the crew. A week later, on May 10, the Employer and Local 33 agreed to all the terms of a contract, including a union-security clause, and signed the agreement a few weeks later.

Under the *Midwest Piping* rule,⁶ as recently explained by this Court (*Retail Clerks Union, Local 770 v. N.L.R.B.*, 370 F. 2d 205, 207),

An employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation may not recognize or enter into a contract with one of these unions until its right to be recognized has finally been determined under the special procedures provided in the Act.

As the courts have stated time and again, this rule imposes a form of neutrality regarding the employees’ choice of bargaining representatives and prohibits an employer, faced with conflicting claims, from treating one of the rivals in such a manner as to give it an improper advantage or disadvantage

⁶ *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060. See also, *Novak Logging Co.*, 119 NLRB 1573, 1574.

in its contest for the employees' favor. *N.L.R.B. v. Air Master Corp.*, 339 F. 2d 553, 557 (C.A. 3); *Iowa Beef Packers, Inc. v. N.L.R.B.*, 331 F. 2d 176, 182 (C.A. 8); *N.L.R.B. v. Signal Oil & Gas Co.*, 303 F. 2d 785, 786-788 (C.A. 5); *St. Louis Independent Packing Co. v. N.L.R.B.*, 291 F. 2d 700, 704 (C.A. 7). *Cf. Pan American World Airways, Inc. v. International Brotherhood of Teamsters, et al.*, ____ F. Supp. ____ (S.D. N.Y.), 66 LRRM 2559, 2566-2567. Since executing a contract constitutes strong support to one union, and gives it a marked advantage, the employer and the unions must refrain from such action until the representation question has been resolved in an impartial and reliable manner by the Board's election processes. *N.L.R.B. v. Signal Oil & Gas Co.*, *supra*, 303 F. 2d at 787; *N.L.R.B. v. National Container Co.*, 211 F. 2d 525, 536 (C.A. 2).

Under the circumstances here, there can be little doubt that when the Employer entered into a collective bargaining agreement with Local 33, Cannery Workers had at least presented a colorable claim of majority representation. The record is uncontroverted that Magellan knew that the Cannery Workers had a majority of the crew of the EASTERN PACIFIC on its membership rolls and that it was seeking a contract. Moreover, Local 33 received more than just the advantage of premature recognition and a bargaining agreement. At the most critical stage, the day the men began work, Magellan told them that he preferred Local 33, and then stood next to them as they signed an authorization statement. The Board properly held that Magellan's action tainted the employees' signatures with unlawful managerial influence, by depriving them of the complete freedom of choice which the Act guarantees. See *L. A. M. v. N.L.R.B.*, 311 U.S. 72, 78; *N.L.R.B.*

v. Link Belt, 311 U.S. 584, 598. In an atmosphere of competition between rival unions, "the employees are sensitive to weight thrown by their employer in favor of one organization as against another, even though the suggestion of preference be subtle or slight." *Iowa Beef Packers, Inc. v. N.L.R.B.*, *supra*, 331 F. 2d at 184, citing *Elastic Stop Nut Corp. v. N.L.R.B.*, 142 F. 2d 371, 375 (C.A. 8), cert. denied, 323 U.S. 722. See also R. 41, n. 51, quoting from *N.L.R.B. v. Burke Oldsmobile*, 288 F. 2d 14 (C.A. 2).

In sum, rather than assisting Local 33, it was incumbent upon the Employer to stay its hand and allow the Board processes to determine a representative through an election. Instead, at the precise moment when the employees were most vulnerable, Magellan improperly brought managerial weight to the support of Local 33. The Employer then agreed upon, and executed, a contract with Local 33, unlawfully arrogating to itself the determination of the employees' bargaining representative.⁷

⁷ By such action an employer interferes with employee rights and gives unlawful assistance, in violation of Section 8(a)(1) and (2). Where the agreement, however, contains a union security clause requiring membership in the favored union, as here, the employer also discriminates in violation of Section 8(a)(3), and the contracting union is a party to the discrimination and violates employee rights, in violation of Section 8(b)(1)(A) and (2). *N.L.R.B. v. Fiore Bros. Oil Co.*, 317 F. 2d 710 (C.A. 2). See, *N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro, et al. (Paul Biazovich, et al.)*, 374 F. 2d 974, 977 (C.A. 9), cert. denied, ____ U.S. ____.

Local 33's main defense, therefore, was correctly rejected on factual grounds.⁸ For this is not a case where the contracting union had been so clearly designated by the employees as to preclude any colorable claim by another union. Initially, in such cases the absence of any real question concerning representation resulted from employee expression of majority choice which was made without any improper employer influence. See, e.g., *Retail Clerks Union, Local 770 v. N.L.R.B.*, *supra*, 370 F. 2d at 207, n. 2; *N.L.R.B. v. Air Master Corp.*, *supra*, 339 F. 2d at 182. As shown, the employees had not freely manifested their desire to be represented by Local 33. That union alone had not by legitimate "spadework" been made the clear selection of the employees. *Retail Clerks Union, Local 770 v. N.L.R.B.*, *supra*, 370 F. 2d at 208. Furthermore, unlike the claims of the disfavored unions in the cases relied upon, the outstanding claim by Cannery Workers was demonstrably more than just a "bare assertion of representation." (*Ibid.*)

Local 33 also contended, before the Board, that no question concerning representation existed because the employees' membership in the Cannery Workers did not, in the circumstances presented here, constitute selection of a representative and bargaining authorization. The Board recognized that a practice of multiple union membership existed in the fishing

⁸ The Employer accepted the Board's adoption of the Trial Examiner's adverse decision and order by not filing any exceptions thereto. See e.g. *N.L.R.B. v. I.A.M., Lodge 942, AFL-CIO*, 263 F. 2d 796, 798-799 (C.A. 9), cert. denied, 362 U.S. 940. The Board recognizes, however, that a holding by the Court that Local 33's defenses have merit would be a determination that the record does not support a finding of unlawful conduct.

industry of Southern California, to enable fishermen to protect themselves under union security contracts when they work on boats under the jurisdiction of different unions. The Board also acknowledged that one of the reasons the crew of the EASTERN PACIFIC were currently members of the Cannery Workers might well have been the benefits derived from continuing membership, or the slight expense of paying monthly dues of \$1 compared to the reinstatement fee of \$125 (*supra*, p. 6). The assertion, however, that union membership in these circumstances should be ignored misconceives the duty of neutrality imposed by the *Midwest Piping* rule.

As the Board noted (R. 37), the issue is not whether the Cannery Workers had been conclusively designated as bargaining representative, but whether that union had sufficiently demonstrated a colorable claim to raise a real question concerning representation. As we have shown, the Cannery Workers had made such a claim. Indeed, Magellan's repeated response to the representation claims of Cannery Workers' officials, made before the assistance to and precipitate recognition of Local 33 on May 3, are wholly inconsistent with the assertion that membership is not attended by any grant of bargaining authority. Magellan, well aware that a majority of the employees picked for the EASTERN PACIFIC were members of Cannery Workers, told the officials that he knew they "had the crew" (*supra*, p. 5).

Finally, as the Board noted (R. 39), it is immaterial that Cannery Workers' rival claim originated before May 3, when the crew of the EASTERN PACIFIC began work; or that an election petition was not filed and may not have been entertained in the bargaining unit until after that date. The

Cannery Workers could surely act to build their representative status before the vessel began operations, and to put the Employer on notice of his duty when either an election or a collective bargaining agreement became permissible. Accordingly, there is no merit in the contention that the Board should consider only what the parties did after the crew began working on May 3, and place no reliance on events occurring before that date. Furthermore, the duty of neutrality created by rival union claims may arise though “[no] petition for an election had been filed by either local, or by the employer as provided by [Section] 9(c)(1) . . .” *N.L.R.B. v. Burke Oldsmobile, Inc.*, *supra*, 288 F. 2d at 16.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue enforcing the Board’s order in full.

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February 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
*Assistant General Counsel,
National Labor Relations Board.*

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject

to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay:

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (c) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he

has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to render the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

[Sec. 10] (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member,

agent, or agency, and to be made a part of the record
Upon the filing of the record with it, the jurisdiction of the
court shall be exclusive and its judgment and decree shall be
final, except that the same shall be subject to review by
the . . . Supreme Court of the United States upon writ of
certiorari or certification as provided in section 1254 of
title 28.

* * * * *

APPENDIX B

Pursuant to Rule 18.2 (f) of the Rules of the Court:

(Page references are to the stenographic transcript)

(Board Cases Nos. 21-CA-6896, CB-2620)

GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received</u>
1(a) through 1(q)	7	7
2(a) through 2(d)	103	106
2(e) through 2(i)	104	106
2(j)	105	106
3	15	23
4	24	43
5	26-27	98
5(a)	97	98
6	100	100
7	101	102

RESPONDENT UNION'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received</u>
1	230	231

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH HENDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

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Title 18 United States Code

§2113(a)

3

§2113(d)

3

Rule

Federal Rules of Criminal Procedure

Rule 5(a)

4

Text

Barron, Federal Practice and Procedure,
Vol. 4

5-6

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH HENDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF ISSUES

Defendant's Opening Brief raises the following issues:

1. Can defendant raise the issue of whether or not his confession was obtained during a period of illegal detention for the first time in this Court?

2. Did the trial judge err in admitting into evidence defendant's confession when defendant failed to produce any evidence of unnecessary delay between his arrest and arraignment?

3. Was defendant's confession rendered

inadmissible merely because it was made prior to the time counsel was appointed to represent defendant?

4. Did the actions of the Assistant United States Attorney prejudice defendant's right to a fair trial?

5. Did the trial judge err in allowing a gun to be marked for identification outside the presence of the jury when the gun was never introduced into evidence?

6. Did the trial judge prejudice defendant's right to a fair trial by interrupting defendant's counsel's cross-examination of Government witnesses?

7. Did the trial judge prejudice defendant's right to a fair trial by interrupting defendant's counsel's direct examination of defendant?

8. Did the trial judge abuse his discretion in unreasonably limiting closing arguments?

9. Was defendant deprived of a fair trial because he was represented by incompetent counsel?

II

STATEMENT OF FACTS

On December 13, 1965, Joseph Henderson and Benjamin Washington were arrested at 4:01 P. M. , in Hayden Corners, Alabama, by Special Agent Thomas Shaugnessy for the robbery of a bank in Los Angeles, California, on November 15, 1965

[R. T. 264, 265, 266 and 282]. ^{1/} The car in which the two men had been riding was searched [R. T. 282], and they were then taken to the Jefferson County, Alabama Jail [R. T. 289] for booking. They arrived at the jail at 5:03 P. M. [R. T. 291], and were involved in the booking procedure until 5:40 P. M. [R. T. 331]. Immediately after the booking was completed, Agent Shaugnessy talked to Mr. Henderson [R. T. 331], who admitted taking part in the robbery of the bank in Los Angeles [R. T. 268].

On December 29, 1965, an indictment charging Joseph Henderson, Benjamin Washington and Willie Lee Henderson with robbery of a national bank by use of a dangerous weapon in violation of Title 18, United States Code, Sections 2113(a) and (d), was filed in the Southern District of California, Central Division [C. T. 2]. ^{2/} Defendants Joseph Henderson and Benjamin Washington were arraigned on January 11, 1966, and counsel was appointed for each of them [R. T. 9]. On January 17, 1966, both defendants entered pleas of not guilty to the charges against them [R. T. 20]. Trial by jury commenced on February 1, 1966 before the Honorable Francis C. Whelan, United States District Judge, Central District of California [R. T. 24]. On February 4, 1966, defendants Joseph Henderson and Benjamin Washington, were found guilty [R. T. 682].

The instant appeal involves only defendant Joseph Henderson.

^{1/} "R. T." refers to Reporter's Transcript.

^{2/} "C. T." refers to Clerk's Transcript.

III

ARGUMENT

- A. THERE IS NO EVIDENCE OF ANY UNNECESSARY DELAY BETWEEN THE ARREST AND THE ARRAIGNMENT OF DEFENDANT AND THEREFORE THE TRIAL JUDGE DID NOT ERR IN ADMITTING DEFENDANT'S CONFESSION INTO EVIDENCE.
-

1. Defendant Should Not Be Allowed to Raise the Issue of Whether or Not His Confession Was Obtained During a Period of Illegal Detention as He Did Not Raise it in the Trial Court.
-

In his opening brief, defendant contends that the trial court erred in allowing his confession into evidence in that it was obtained during a period of illegal detention, in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. Defendant's Opening Brief, 4. The Reporter's Transcript of the proceedings in the trial court below does not show that this contention was ever made in the court below. Rather, defendant's counsel, Mr. Raymond Finn, attempted to have the confession excluded on the ground that it was not free and voluntary. Cf. Mr. Finn's cross-examination of Agent Shaugnessy, R. T. 287-294, and his direct examination of defendant Henderson, R. T. 305-308. Having failed to raise this issue in the trial court, defendant should not be allowed to raise it for the first time in this Court. See United States v. Ladson, 294 F.2d 535, 538 (2 Cir. 1961), cert. denied 369 U.S. 824 (1962);

Rugendorf v. United States, 376 U.S. 528 (1963), reh. denied 377 U.S. 940 (1964); and Williams v. United States, 358 F.2d 325 (9 Cir. 1966).

2. Defendant Failed to Produce Any
Evidence to Show that the Delay
Between His Arrest and Arraign-
ment Was Unnecessary.

Even if this Court determines that defendant can raise the issue, it is the Government's contention that the trial judge did not err in admitting the confession. The Supreme Court has made it clear that not every confession which is made after an arrest but prior to arraignment before a commissioner is thereby rendered inadmissible. See McNabb v. United States, 318 U.S. 332, 346 (1942), reh. denied 319 U.S. 784 (1942) and United States v. Carignan, 342 U.S. 36, 44 (1951). On the contrary, for the confession to be rendered inadmissible it must be shown that the confession was made during a period of illegal detention resulting from a failure to carry the prisoner before a commissioner. Williams v. United States, 273 F.2d 781, 797 (9 Cir. 1960), cert. denied 362 U.S. 951 (1960). The burden is upon the defendant to show that the failure to carry the prisoner before a commissioner promptly constitutes unnecessary delay. See United States v. Walker, 176 F.2d 564, 567 (2 Cir. 1949), cert. denied 338 U.S. 891 (1949), and Joseph v. United States, 239 F.2d 524, 527 (5 Cir. 1957). See also, Barron, Federal Practice and Procedure, Vol.

Defendant failed to produce any evidence in the trial court that there was any unnecessary delay between his arrest and arraignment. In fact, the time of arraignment does not even appear in the record. Defendant merely contends that Agent Shaugnessy should have taken him (defendant), directly to a commissioner and that the commissioner probably was available at 5:03 P. M. Defendant's Opening Brief, p. 6. There is, however, absolutely no evidence that a commissioner was in fact available at the time defendant arrived at the jail for booking (5:03 P. M.) [R. T. 289], or that any commissioner maintained regular business hours after 5:00 P. M.

Contrary to defendant's contention, it is clear in this Circuit that an arresting officer does not "have to make a bee line to the Commissioner's Office". Williams, supra, 273 F.2d at 797. See also Ladson, supra, 294 F.2d at 537-538, and Rogers v. United States, 330 F.2d 535, 539 (5 Cir. 1964), cert. denied 379 U.S. 916 (1964). It is also clear that an arresting officer may "book" the arrested person prior to taking him before a commissioner. Mallory v. United States, 354 U.S. 449, 454 (1957); Ginoza v. United States, 279 F.2d 616, 620 (9 Cir. 1960), and Muldrow v. United States, 291 F.2d 903, 906 (9 Cir. 1960). Further, an arresting officer is not required to take an arrested person to a commissioner except during the commissioner's regular office hours. Symons v. United States, 178 F.2d 615, 621 (9 Cir. 1949), cert. denied 339 U.S. 985 (1950); Scherk v.

United States, 242 F. Supp. 445 (D.C. N.D. Cal. 1965), aff'd 354 F.2d 239 (9 Cir. 1965), cert. denied 382 U.S. 882 (1965); and United States v. Price, 345 F.2d 256, 262 (2 Cir. 1965), cert. denied 382 U.S. 949 (1965).

The record shows that defendant never alleged in the trial court that his confession was obtained during a period of illegal detention and never introduced any evidence to show that the delay between his arrest and arraignment was unnecessary. Based on this record, the trial judge did not err in admitting defendant's confession into evidence.

B. DEFENDANT'S CONFESSION WAS
 NOT RENDERED INADMISSIBLE
 MERELY BECAUSE IT WAS MADE
 PRIOR TO THE APPOINTMENT OF
 COUNSEL.

Defendant apparently contends that his confession was inadmissible because it was obtained at a time when he was not represented by counsel. The Government does not dispute the fact that defendant was not represented by counsel at the time he made the confession; however, it is the Government's position that the confession was admissible in that defendant knowingly waived his right to counsel.

Agent Shaugnessy testified that he informed defendant of his rights prior to talking to him (defendant) [R. T. 267-268, 287-288 and 325-326-7]. According to Agent Shaugnessy:

"At the outset I advised Mr. Henderson

that he did not have to make any statement to me, any statement he did make could later be used against him in a court of law.

"I further advised him of his right to consult an attorney or anyone else before making any statement, and if he could not hire an attorney the judge would furnish one for him." [R. T. 267-268].

Agent Shaugnessy further testified that defendant said that he (defendant), understood his rights [R. T. 288 and 326], and then voluntarily confessed to the robbery [R. T. 288, 291-292 and 326].

Defendant admitted that Agent Shaugnessy had informed him of his rights prior to talking to him [R. T. 307]. Defendant denied, however, that Agent Shaugnessy had informed him of his right to a lawyer [R. T. 307], or that he had made the statements attributed to him [R. T. 308].

In ruling that defendant had been advised of his constitutional rights [R. T. 380], the trial judge indicated that he chose to believe Agent Shaugnessy and to disbelieve defendant. Such a ruling merely involves a determination of the credibility of witnesses and, as it is a matter for the trier of facts -- in this instance the trial judge -- to decide, is not normally subject to attack upon appeal. See Bloom v. United States, 272 F.2d 515, 223 (9 Cir. 1959), cert. denied 363 U.S. 803 (1960).

Viewing the evidence in this case in the light most favorable to the Government, as this Court must, Noto v. United States,

67 U.S. 290, 296 (1961), and Redmon v. United States, 355 F.2d 407, 411 (9 Cir. 1966), it is clear that defendant was adequately advised of his rights. Nothing in the rationale of the Escobedo v. Illinois decision, 2a/ 378 U.S. 478 (1964), or the Miranda v. Arizona decision, 3/ 384 U.S. 436 (1966), renders defendant's confession inadmissible. To the contrary, defendant received all the warnings guaranteed by the Miranda decision, 384 U.S. at 479. As United States v. Slaughter, 366 F.2d 833 (4 Cir. 1966), which defendant relies upon, clearly recognizes the right to counsel may be waived. 366 F.2d at 840. In the instant case, having been advised of his right to counsel, defendant knowingly, intelligently and voluntarily waived that right. Under these circumstances, the trial judge did not err in admitting his confession.

C. THE ACTIONS OF THE ASSISTANT
UNITED STATES ATTORNEY DID
NOT PREJUDICE DEFENDANT'S
RIGHT TO A FAIR TRIAL.

Defendant in his opening brief cites three instances of alleged misconduct by the Assistant United States Attorney which he contends prejudiced the jury and deprived him of a fair trial.

a/ The case itself is not applicable to the instant case in that nowhere in the instant record is there any indication that defendant ever requested to see an attorney.

1/ The Miranda decision was rendered subsequent to trial in the instant case and therefore it is not controlling. Johnson v. State of New Jersey, 384 U.S. 719 (1966), reh. denied 385 U.S. 890 (1966).

Defendant's Opening Brief, 10-15. Two of the instances of the alleged misconduct involve the displaying and having marked for identification a gun, and the third involves conversation with a juror who was subsequently replaced.

Prior to the commencement of the trial of this case, the Assistant exhibited a gun in such a manner that it was apparently visible to the jury panel [R. T. 25]. Sometime thereafter, but also prior to the commencement of the trial, the gun was put in the clerk's desk [R. T. 24-25]. When Mr. Finn informed the trial judge that the jury panel had seen the gun [R. T. 25], the following colloquy took place:

"THE COURT: . . . we will impanel the jury and I will ask them if the fact that if any of them has seen the gun it would affect their consideration of the case, if it should appear that the gun does not come into evidence.

"THE COURT: . . . what is your attitude?

"MR. FINN: I would rather that you did not question them about the gun on voir dire, Your Honor.

"THE COURT: That is what I am talking about.

"MR. FINN: Yes.

"THE COURT: Very well." [R. T. 26-27]

The second alleged instance of misconduct occurred outside the presence of the jury [R. T. 316-321]. The Assistant made an offer of proof concerning the admissibility of the gun [R. T. 272-274]. A discussion concerning the admissibility of the gun was then held. At the conclusion of this discussion, the Assistant announced that he would not go into the matter of the gun [R. T. 320]. There is nothing in the record to indicate that he did not honor that position.

The Government respectfully submits that the Assistant's conduct in respect to the gun did not prejudice defendant. If the mere exhibiting of the gun in front of the jury panel had in fact prejudiced any of the jurors, that could have been determined by questioning the jurors. But, defendant's counsel objected to the trial judge's going into the matter [R. T. 27]. There is no evidence that the jury ever saw the gun again. To the contrary, it can be inferred that when Mr. Finn stated in his closing argument "They [the Government] talked about guns. There have been no guns produced at this trial," [R. T. 595] that the gun was not, and had not been, visible to the jury. Further, the attempt by the Assistant to lay a foundation for having the gun admitted into evidence, outside the presence of the jury, clearly could not possibly have prejudiced the jury, who never knew that the attempt had been made against defendant.

Turning to the third instance of alleged misconduct, the Assistant spoke to one of the jurors during a noon recess on the first day of the trial [R. T. 73]. He then called the trial judge's

attention to the situation before the jury returned and the juror, Mrs. Gurney, was replaced by the alternate [R. T. 73, 76 and 87].

Even though the juror that spoke to the Assistant was removed, defendant appears to contend that the conversation between Mrs. Gurney and the Assistant prejudiced the jury against him. The Reporter's Transcript shows that the trial judge brought the jurors in and questioned each of them before deciding to proceed with the case. The judge asked the jurors the following questions:

" . . . if the Court should feel it incumbent upon it to withdraw Mrs. Gurney as a juror would that in any way affect your consideration of this case?"

.

"And you feel that you would be able to render a fair and impartial verdict?" [R. T. 83].

Each of the jurors stated that the withdrawal of Mrs. Gurney would not affect their consideration of the case and that they could render a fair and impartial verdict [R. T. 83-87]. Only after he had such an assurance, did the trial judge proceed with the trial.

There is no evidence to indicate that the jurors were untruthful when they answered the trial judge's questions. Rather it must be presumed that the jurors answered the questions truthfully and that they faithfully performed their official duty. Canvess v. United States, 187 F.2d 719, 723 (9 Cir. 1951), cert. denied 341 U.S. 951 (1951). The Government respectfully submits that in this instance there was no prejudice to defendant. Cf. United States v. Kompinski, 373 F.2d 429, 432 (2 Cir. 1967).

D. THE TRIAL JUDGE DID NOT ERR
IN ALLOWING A GUN TO BE
MARKED FOR IDENTIFICATION
OUTSIDE THE PRESENCE OF THE
JURY.

Defendant's contention apparently is that the trial judge erred as a matter of law in allowing the gun to be marked for identification. Defendant's Opening Brief, 12-13. The Reporter's Transcript shows that the gun was marked outside the presence of the jury [R. T. 321], and there is no evidence that the fact that the gun had been marked for identification was ever brought to the attention of the jury. There is no showing that the trial judge's action prejudiced defendant. Cf. Campbell v. United States, 368 F.2d 521, 523 (10 Cir. 1966). Clearly, under these circumstances, there is no basis in fact to support defendant's contention that it was error merely to permit the gun to be marked.

E. THE TRIAL JUDGE'S INTERRUPTIONS
OF MR. FINN'S CROSS-EXAMINATION
OF THE GOVERNMENT WITNESSES
DID NOT PREJUDICE DEFENDANT'S
RIGHT TO A FAIR TRIAL.

Defendant lists approximately sixteen instances where the trial judge allegedly interrupted Mr. Finn's cross-examination of the Government's witnesses to the prejudice of defendant. Defendant's Opening Brief, 15. While the Reporter's Transcript does show interruptions by the trial judge, it also clearly shows that the interruptions did not disrupt or affect Mr. Finn's cross-

examination of the witnesses.

Defendant apparently contends that the interruptions were prejudicial no matter what the purpose or content of the interruptions. For example, defendant cites page 247 of the Reporter's Transcript as containing two instances of interruptions by the trial judge. Defendant's Opening Brief, 15 (line 21). In fact, the following colloquy appears on page 247:

"MR. FINN: Will you please step to the diagram?

"Q. Do you understand the diagram?

"A. Well, if this is the lobby here, then this is the --

"THE COURT: Speak up more loudly, because the jury can't hear you. Turn more towards the jury. Turn your back this way.

"By MR. FINN:

"Q. Will you please indicate approximately on that diagram where Betty Anderson was at the time of the robbery?

"A. She was here.

"THE COURT: She has already testified concerning the location. Do you want her to -- this thing is beginning to have so many marks on it -- you can have her place a mark on it.

"By MR. FINN:

"Q. Would you indicate that again please?

"A. Here.

"Q. Indicating the mark with the arrow leading to 'D-2. '

"A. Do you want me to draw a line?

"Q. No. I am just stating this for the record."

Clearly, Mr. Finn's cross-examination of this witness was not adversely affected by the trial judge's two interruptions. The Government respectfully submits that the other instances of interruptions likewise fail to show any disruption of Mr. Finn's cross-examination of the witnesses. There is absolutely no showing of prejudice to defendant.

F. THE TRIAL JUDGE'S INTERRUPTIONS OF MR. FINN'S DIRECT EXAMINATION OF DEFENDANT DID NOT PREJUDICE DEFENDANT'S RIGHT TO A FAIR TRIAL.

Defendant lists approximately sixteen instances where the trial judge allegedly interrupted Mr. Finn's direct examination of defendant to the prejudice of defendant. Defendant's Opening Brief, 16. The instances cited by defendant, however, fail to show that the interruptions affected defendant's presentation of his side of the case. The Government respectfully submits that there is a total absence of any indication that the trial judge's interruptions disrupted Mr. Finn's direct examination of defendant or that defendant was hindered in any way in his efforts to get his version of the facts before the jury.

"Q. Indicating the mark with the arrow leading to 'D-2.'

"A. Do you want me to draw a line?

"Q. No. I am just stating this for the record."

Clearly, Mr. Finn's cross-examination of this witness was not adversely affected by the trial judge's two interruptions. The Government respectfully submits that the other instances of interruptions likewise fail to show any disruption of Mr. Finn's cross-examination of the witnesses. There is absolutely no showing of prejudice to defendant.

F. THE TRIAL JUDGE'S INTERRUPTIONS OF
MR. FINN'S DIRECT EXAMINATION OF
DEFENDANT DID NOT PREJUDICE DEFEN-
DANT'S RIGHT TO A FAIR TRIAL.

Defendant lists approximately sixteen instances where the trial judge allegedly interrupted Mr. Finn's direct examination of defendant to the prejudice of defendant. Defendant's Opening Brief, 16. The instances cited by defendant, however, fail to show that the interruptions affected defendant's presentation of his side of the case. The Government respectfully submits that there is a total absence of any indication that the trial judge's interruptions disrupted Mr. Finn's direct examination of defendant or that defendant was hindered in any way in his efforts to get his version of the facts before the jury.

G. THE TRIAL JUDGE DID NOT ABUSE
HIS DISCRETION IN UNREASONABLY
LIMITING CLOSING ARGUMENTS.

Defendant contends that the trial judge unduly restricted his and co-defendant's closing arguments. Defendant's Opening Brief, 16. As a matter of law, the rule that a trial judge may, in his discretion, limit the amount of time for argument is well settled. See Barnard v. United States, 342 F.2d 309, 320 (9 Cir. 1965), cert. denied, 382 U.S. 948 (1965), reh. denied, 382 U.S. 1002 (1966) and United States v. Mills, 366 F.2d 512, 515 (6 Cir. 1966).

In the instant case, the trial below lasted slightly more than three calendar days. [R.T. 24, 548 and 582.]^{4/} Only twelve witnesses, including defendant and his co-defendant, were called. The Government's case, primarily, consisted of the testimony of five employees of the bank who identified the two defendants as being the robbers, the testimony of Agent Shaugnessy who related defendant's confession to the jury and the testimony of Willie Lee Henderson, the third participant in the robbery. Defendant and the co-defendant both offered testimony that they were at some place other than the bank at the time the robbery occurred. Therefore, the defenses of the two defendants were

^{4/} As the Reporter's Transcript shows, only a minority of the calendar time was spent in actual trial of the case before the jury. According to the trial judge's calculations, only about five and a half hours of the first two days were actually spent trying the case before the jury. [R.T. 372-373.]

the same and the only issue before the jury was the credibility of the various witnesses. On Wednesday, before the trial ended on Friday, the trial judge indicated to Mr. Finn and Mr. McCament, counsel for co-defendant Washington, that he was considering limiting the defendants' closing argument to one hour. [R. T. 372.] At that time, Mr. Finn had stated that he did not anticipate that his argument would take longer than a half hour. [R. T. 372.] Mr. Finn, in fact, used only twenty-seven minutes in his closing argument on behalf of defendant. [Cf. R. T. 434 and 606.] There is no evidence that Mr. Finn, at the conclusion of his argument, requested additional time. The Government respectfully submits, therefore, that, on this record, the trial judge did not abuse his discretion in unreasonably limiting Mr. Finn's closing argument.^{5 /}

^{5 /} The Government also submits that defendant was not prejudiced by the trial judge's limitation on the amount of time that Mr. McCament was allowed to argue on behalf of co-defendant Washington. Mr. McCament requested "an hour maximum" [R. T. 434], and he was ultimately allowed approximately fifty minutes. [Cf. R. T. 634, 638 and 639] When this factor is considered along with the factors mentioned above, i. e., the shortness of the trial, the limited number of witnesses, the similarity of the defenses, and the limited number of issues involved, it is clear that the trial judge did not abuse his discretion in unreasonably limiting Mr. McCament's closing arguments.

H. DEFENDANT WAS EFFECTIVELY
REPRESENTED BY COMPETENT
COUNSEL.

Defendant contends that Mr. Finn did not effectively represent him in the trial below. According to defendant, Mr. Finn's ineffectiveness was partially due to the fact that he (Mr. Finn), did not have sufficient time to prepare the case prior to the start of the trial. It is the Government's position that, aside from the issue of whether Mr. Finn was adequately prepared at the commencement of the trial, the trial judge did not err in commencing the trial three weeks after the date of arraignment. The record does not show that Mr. Finn, or Mr. McCament, ever requested a continuance. To the contrary, the Reporter's Transcript shows that when the trial judge proposed the trial date—⁶/ both stated that the date was agreeable with them. [R. T. 20.]

Defendant contends that he was deprived of the effective assistance of counsel because Mr. Finn was not prepared for trial and, after the commencement of trial, was overshadowed by co-counsel, Mr. McCament. Defendant's Opening Brief, 17-21. The Government respectfully submits that the Reporter's Transcript shows that both contentions are without merit.

Defendant cites Mr. Finn's failure to move to suppress,

⁶ / The trial actually started one day later than the date originally proposed by the trial judge. [Cf., R. T. 20 and 24.]

prior to the commencement of the trial, a gun seized from the defendants at the time of their arrest, and his inability to respond to three questions propounded by the trial judge as evidence of Mr. Finn's lack of preparation. Defendant's Opening Brief, 18-19. All the cited instances concern the question of the admissibility of the gun and, as the Government has previously pointed out, the gun was never introduced into evidence and, in fact, the only effort to introduce the gun was made outside the presence of the jury. [R. T. 273-274 and 320-321.] Therefore, Mr. Finn's failure to move to suppress or to answer the questions^{7 /} could not have prejudiced defendant in any way. In addition, there is no evidence to suggest that Mr. Finn was not adequately prepared at the start of the trial. Contrary to Kyle v. United States, 263 F.2d 657 (9 Cir. 1959), there is no evidence that Mr. Finn was unaware of any material evidence or that he did not communicate with defendant. Rather, the Reporter's Transcript indicates that Mr. Finn was aware of the Government's theory of the case and that he put on the only defense that was available to him.

As a second basis for his contention that he was deprived of the effective assistance of counsel, defendant alleges that Mr. Finn's representation was inadequate because he (Mr. Finn),

^{7 /} Mr. Finn was not alone in being unable to answer the questions propounded by the trial judge. Mr. McCament was not able to answer any of the questions [R. T. 278, 284 and 285], and the Assistant was unable to answer the single question propounded to him. [R. T. 278.]

was overshadowed by Mr. McCament "and the whole of the defense effort and strategy seemed to be dictated by the efforts made on behalf of defendant Washington." Defendant's Opening Brief, 20. Of the five bank employees who testified, only two were able to identify defendant as being one of the robbers.^{8/} Therefore, Mr. Finn's cross-examination of the bank employees was obviously less extensive than Mr. McCament's. However, defense cross-examination of Agent Shaugnessy was conducted almost exclusively by Mr. Finn [Cf. R. T. 331-342 and 342-343], and defense cross-examination of Willie Lee Henderson was almost equally divided between Mr. Finn and Mr. McCament [Cf. R. T. 362-366, 380-392 and 392-407]. The Government respectfully submits that there is absolutely no evidence to suggest that Mr. Finn abdicated his responsibility of representing defendant to the best of his ability.

This Court has repeatedly held that the standard to be applied in evaluating the adequacy of trial counsel is that the counsel's performance must be so incompetent as to make the trial "a farce or a mockery of justice." Rivera v. United States, 318 F.2d 606, 608 (9 Cir. 1963), and Grove v. Wilson, 368 F.2d 414, 416 (9 Cir. 1966), and cases cited therein. The proceedings in the court below were far from being a "farce" or a "mockery of justice." The Government respectfully submits that the Reporter's Transcript shows that Mr. Finn ably represented defendant.

^{8/} The direct testimony of the two witnesses appears on pages 125-140 and 236-245 of the Reporter's Transcript; Mr. Finn's cross-examination appears on page 140-146 and 245-251.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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IN THE

United States Court of Appeals

For the Ninth Circuit

MAURICE M. WILLS and
GERTRUDE E. WILLS,

Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Appellee.

No. 22,427 ✓

ON APPEAL FROM THE JUDGMENT OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE APPELLANTS

FILED

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OPINION BELOW

The Opinion of the Court below is reported at 48 T.C.,
No. 30 (T. 43 through 59 incl.).

JURISDICTION

Pursuant to a statutory Notice of Deficiency dated
March 7, 1966, asserting a deficiency in Federal Income

Tax for the taxable years 1962 and 1963 against the Appellants herein in the total amount of \$8,567, Appellants filed a Petition in the Tax Court of the United States on April 21, 1966 (R. 1). The Petition was answered by the Commissioner of Internal Revenue on June 13, 1966 (R. 14).

The case was heard before the Honorable William M. Fay in Seattle, Washington on the 30th day of November, 1966 (T. 1).^{*} The Tax Court entered its decision and served the same on June 14, 1967 (T. 43). The decision of the Tax Court was entered on July 26, 1967 (T. 65).

Appellants herein filed a timely Petition for Review of the Decision of the Tax Court on October 20, 1967 (T. 67). Appellants also filed a Statement of Points Relied Upon on October 20, 1967 (T. 73).

Jurisdiction is conferred upon this Court by Section 7482 (a) of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether Appellants' home for Federal Income Tax purposes during each of the taxable years 1962 and 1963, was in Spokane, Washington, or in Los Angeles, California, where Appellant, Maurice Wills, played baseball for the Los Angeles Dodgers during both said taxable years?

^{*}All references to the Transcript on Appeal shall be cited as "T", while references to the official report of the proceedings before the Tax Court of the United States, i.e., Volume II of the Transcript of the Record shall be cited as "R".

2. Did Appellants receive taxable income on the alleged fair market value of the S. Rae Hickok belt which was awarded to Appellant Maury Wills as emblematic of his selection as Professional Athlete of the Year for 1962 or upon the fair market value of an M.G. automobile awarded to him in 1962?

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions applicable to this proceeding are set forth in Appendix A, *infra*.

STATEMENT

The Appellants are husband and wife with their principal residence during the periods involved herein being located at 15414 East 36th Avenue, in the City of Veradale, State of Washington. The returns for the periods here involved were all timely filed with the District Director of Internal Revenue for the District of Washington, in Tacoma, Washington, and the tax shown as due thereon fully paid (T. pg. 1, 2, 14).

The Notice of Deficiency was mailed to petitioners on the 7th day of March, 1966 (T. pg. 7).

The deficiencies as determined by the Commissioner of Internal Revenue were in Federal Income taxes for the taxable years 1962 and 1963 in the total amount of \$8,567.00 (T. pg. 2).

The Federal Income Tax returns as filed by the Appellants for the taxable years 1962 and 1963 were filed on the cash basis of accounting. On each of the said returns as

filed, Appellants declared Veradale, Washington, as their home and listed Appellant Maury Wills occupation as professional baseball player. Appellant Maury Wills, will sometimes, for the sake of convenience, be referred to as either "Appellant" or "Wills" (T. pg. 31, para. 2). On the 1962 Federal Income Tax Return as filed Appellant Maury Wills claimed travel expenses for meals and lodging for 87 days in Los Angeles. On the tax return filed for 1963, petitioner Maury Wills claimed meals and lodging while in Los Angeles for a total of 87 days (Exs. 1-A, 2-B).

The 1962 and 1963 baseball contracts signed by Wills and the Dodgers listed Will's home address as Spokane, Washington. Under the terms in each of the contracts, Wills agreed to perform in a loyal manner, to promote the welfare of baseball, to allow his picture to be taken and to make public appearances. In addition, Wills agreed to maintain himself in top physical condition, that he would not play baseball for anyone else. The Dodgers could terminate the contract if Wills failed, refused or neglected to be a good citizen; failed to exhibit sufficient skills to qualify as a member of the team or failed to render service to the club. Wills also had to comply with the Regulations of the National Baseball League. The Regulations provide that the club would pay necessary travel expenses of the player to his home at the end of the season (Exs. 3-C and 4-D).

Maury Wills started his professional baseball career in 1951 with Hornell, New York. During the 1959 baseball season, Wills played 48 games for Spokane, Washington, in the Pacific Coast League, a Dodger AAA farm club. Wills

was “called-up” during the 1959 season (June), played 83 games with the Los Angeles Dodgers, hit .260, played in all six games of the 1959 World Series and hit .250. The following is a yearly breakdown of Maury Wills baseball career from 1951 through 1964:

Year	Club	G	AB	R	H	2B	3B	HR	RBI	SB	PCT.
1951	Hornell, N.Y.	123	461	94	129	16	6	4	51	54	.280
1952	Hornell, N.Y.	125	533	108	160	34	4	4	58	54	.300
1953	Pueblo, Colo.	18	63	17	18	2	0	0	8	8	.286
1953	Miami	93	343	71	98	16	5	6	31	20	.286
1954	Pueblo, Colo.	145	552	89	154	17	10	6	53	28	.279
1955	Fort Worth	123	326	44	66	11	0	7	39	12	.202
1956	Pueblo, Colo.	134	540	110	163	33	8	10	54	34	.302
1957	Seattle	147	491	67	131	23	6	0	33	21	.267
1958	Spokane	144	534	69	135	20	7	2	37	25	.253
1959	Spokane	48	192	42	60	6	3	1	18	25	.313
1959	Los Angeles	83	242	27	63	5	2	0	7	7	.260
1960	Los Angeles	148	516	75	152	15	2	0	27	50	.295
1961	Los Angeles	148	613	105	173	12	10	1	31	35	.282
1962	Los Angeles	165	695	130	208	13	10	6	48	104	.299
1963	Los Angeles	134	527	83	159	19	3	0	34	40	.302
1964	Los Angeles	158	630	81	173	15	5	2	34	53	.275
Major Totals (6 yrs.)		836	3223	501	928	79	32	9	181	289	.288

World Series Record

1959	Los Angeles	6	20	2	5	0	0	0	1	1	.250
1963	Los Angeles	4	15	1	2	0	0	0	0	1	.133
World Series Totals		10	35	3	7	0	0	0	1	2	.200

(Stip. para 3, T. pg. 32).

In 1960, Wills played in 148 games for the Dodgers, had a .295 batting average, and led the Dodgers and the National League in stolen bases with 35. In 1962, Wills played in 165 games for the Dodgers, had a .299 batting average, stole 104 bases, and tied with three other ballplayers for the most triples hit in the National League. In 1962, Maury Wills also led the Dodgers in most games played (165), most times at bat (695), one time at bat short of an all-time record; most runs (130), a Dodger Club record; most singles (179), a Dodger Club record; and most stolen

bases (104). He was tied with teammate Willie Davis for most triples. Mr. Wills was unsuccessful in his attempts to steal bases a total of 13 times in 1962. He was the subject of leading magazine articles in *Life*, *Newsweek*, *Sports Illustrated*, and *Time* during the year 1962. Mr. Wills appeared in the July 1962 All-Star game as a pinch runner for Stan Musial. He stole second base and came home on a single. In the top of the eighth inning, Mr. Wills singled, stole third on a single and came home on a short foul fly catch. In 1962, Wills was voted the "Most Valuable Player" in the National League. Wills in 1962 was selected as "Washington State's Most Distinguished Citizen." Wills in 1962 was voted as "Player of the Game" in the All-Star game. In 1962, Maury Wills individually stole more bases than any other team in baseball. In 1962, he received the following additional awards:

- (a) Associated Press, "Athlete of the Year"
- (b) California, "Athlete of the Year"
- (c) Baseball Writers, "Athlete of the Year"
- (d) Sport Magazine, "Man of the Year"

In 1962, Wills, by playing in 165 games, established a record for the most games played in a single season by any ballplayer in the history of the game (Stip. para. T. 32, 33).

On October 3, 1962, during a Dodger home baseball game, Mr. Wills was awarded an MG automobile whose re-

tail value at that time was \$2,196. The wholesale value of such car was \$1,731. Mr. Wills retained the automobile and drove it until early in 1964, at which time he traded it in on another sports car and was allowed \$1,318.52 as a trade-in. Mr. Wills had no option of taking cash in lieu of the car. The automobile was awarded by the Millard Automobile Agency of Los Angeles, California. The automobile agency had had programs printed, one of which was given to each individual coming into the Dodger stadium for a game held several days prior to the award. On each program a provision was made for a vote for the "most popular Dodger." The programs were turned in at the conclusion of the game and the votes were then tabulated. Mr. Millard, of the Millard Agency, made the presentation of the automobile to Mr. Wills. Wills was not required to perform subsequent services to the Millard Agency and was selected without any action on his part. (Stip. para. 5, T. 33, 34).

Following the 1962 season, Milton Berle developed a routine for a nightclub act with Maury Wills and five other Dodgers. The group appeared in Las Vegas in 1962 and 1963 and at Miami Beach, Florida, in 1963. It was made up of Don Drysdale, Sandy Koufax, Duke Snider, Frank Howard and Willie Davis. Mr. Wills received a total of \$18,000 in 1963 from the Las Vegas engagements, and a total of \$1,400 in 1963 from the Miami, Florida, engagement (Stip. para. 6, T. 34).

In January of 1962, the Appellants purchased a personal residence in Veradale, Washington, on the outskirts of Spo-

kane, Washington. Appellants maintained such home during the years 1962 and 1963 and the Appellant Gertrude Wills and their five children resided there during such period of time. When Maury Wills was in Spokane, he also stayed at this residence. Maury Wills was located in the following places during 1962 and 1963 for the indicated period of time. The Veradale home has seven rooms and is located upon approximately three acres of land. Wills bought his first home in Spokane, Washington, in 1953 and kept that home as rental property until sold in 1965:

1962						
Dates		Location				Days
January	1	through	February	27	Spokane, Washington	58
February	28	through	April	8	Florida	39
April	9	through	October	3	Baseball season	
October	4	through	December	23	Spokane, Washington	80
December	24	through	December	31	Las Vegas, Nevada	7
1963						
January	1	through	January	22	Las Vegas, Nevada	21
January	23	through	February	28	Spokane, Washington	36
March	1	through	April	8	Florida	37
April	9	through	October	10	Baseball season	
October	11	through	November	12	Spokane, Washington	32
November	13	through	December	2	Las Vegas, Nevada	19
December	3	through	December	31	Spokane, Washington	28

(Stip. para. 7, T. 34, 35).

During the 1962 and 1963 regular baseball seasons Appellant Wills was in Los Angeles approximately one-half of the time since the team traveled to other National League cities to play baseball (Stip. para. 7, T. 34, Exs. 8-H, 9-I).

Mr. Wills spent a total of 138 days of the year 1962 in Spokane, Washington, and lived, during that time, at his Veradale, Washington, home. The Appellee allowed the

Appellants a deduction based on estimated expenses of Mr. Wills at \$7 a day while in the Spokane, Washington, area totaling \$966. (Stip. para. 8, T. 35).

Mr. Wills spent a total of 96 days of the year 1963 in Spokane, Washington, and lived, during that time, at his Veradale, Washington, home. The Appellee allowed the Appellants a deduction based on the estimated expenses of Mr. Wills of \$7 per day while in the Spokane, Washington, area totaling \$672. (Stip. para. 9, T. 35).

In 1962, the Appellants deducted \$2,205 as travel expenses attributable to Mr. Wills' presence in the Los Angeles, California, area. The total amount of this deduction was disallowed by the Appellee for 1962. In 1963, the Appellants deducted \$2,095 as travel expenses attributable to Mr. Wills' presence in the Los Angeles, California, area. The total amount of this deduction was disallowed by the Appellee for 1963. (Stip. para. 10, T. 35).

In 1963, Mr. Wills spent a total of 21 days in Los Angeles rehearsing for performances at the Desert Inn and Sahara Inn at Las Vegas, Nevada. The Appellants deducted \$315 in addition to the \$2,095 mentioned above. The total amount of this deduction was disallowed by the Appellee for 1963. (Stip. para. 11, T. 35, 36).

Maury Wills performed official duties for the Los Angeles Dodgers while in Spokane, Washington, in 1962 and 1963. (Stip. para. 12, T. 36).

In January 1963, Maury Wills received the S. Rae Hick-

ok belt which is awarded yearly to the outstanding professional athlete. Such award was made for Wills' activities in the year 1962. The Hickok belt is awarded by the Hickok Belt Company of Rochester, New York. Wills was not required to perform subsequent services to the Hickok Belt Company and was selected without any action on his part. (Stip. para. 13, T. 36).

The idea for the belt award was originally conceived by Murray Goodman after he had been approached by the sons of Mr. Rae Hickok, who wished to establish a memorial for their father. Goodman suggested that, as the Hickoks were in the belt manufacturing business, they might provide a jewel-studded belt which would be awarded to the outstanding professional athlete of the year. Accordingly, for each year since (1950 through 1965), a belt containing 27 one and one-half carat diamonds, a ruby (simulated), a sapphire stone (simulated), and a three and one-half pound gold belt buckle, has been awarded. The total cost of the belt to the Hickok Belt Company for the belt awarded Mr. Wills was \$6,038.19. (Ex. 5-E, Stip. para. 14, T. 36). but this is reduced by labor costs of \$321.56.

Since its inception, there have been sixteen winners of the Hickok belt. The winners and their principal professional sporting activity are:

1950	Phil Rizutto	Baseball
1951	Allie Reynolds	Baseball
1952	Rocky Marciano	Boxing
1953	Ben Hogan	Golf

1954	Willie Mays	Baseball
1955	Otto Graham	Football
1956	Mickey Mantle	Baseball
1957	Carmen Basilio	Boxing
1958	Bob Turley	Baseball
1959	Ingemar Johansson	Boxing
1960	Arnold Palmer	Golf
1961	Roger Maris	Baseball
1962	Maury Wills	Baseball
1963	Sandy Koufax	Baseball
1964	Jim Brown	Football
1965	Sandy Koufax	Baseball

The 1950 winner, Phil Rizzuto, was also named the American League's most valuable player in 1950 by the Baseball Writers Association; the 1952 winner, Rocky Marciano, won the heavyweight boxing championship of the world in September 1952; the 1953 winner, Ben Hogan, won the master's championship, the United States open championship, and the British open championship in 1953; the 1954 winner, Willie Mays was named the National League's most valuable player in 1954 by the Baseball Writers Association; the 1956 winner, Mickey Mantle, was named the American League's most valuable player for 1956 by the Baseball Writers Association, was the American League home run champion and the American League batting champion in 1956; the 1957 winner, Carmen Basilio, was both the welterweight and the middleweight boxing champion of the world in 1957; the 1959 winner, Ingemar Johansson, won the heavyweight boxing championship of the world in that year; the 1960 winner, Arnold Palmer, won the United States

open golf championship and the master's championship in 1960; the 1961 winner, Roger Maris, was named the most valuable player of the American League of 1961 by the Baseball Writers Association, led the major league in home runs and broke the late Babe Ruth's record for most home runs in one season in 1961 with 61 home runs; the 1963 winner, Sandy Koufax, was named the most valuable player of the National League in 1963 by the Baseball Writers Association, and won the Cy Young award as major league pitcher of the year, also selected by the Baseball Writers Association. (Stip. para. 15, T. 36, 37, 38).

The final ballot for the 1962 voting on the Hickok award was sent to the judges from Murray Goodman. In the ballot the judges were instructed to consider not only performance but sportsmanship and value to a team or sport. (Stip. para. 16, T. 38, Ex. 6-F).

Nobel prizes are awarded yearly to "those who had most benefited mankind during the preceding year." Pulitzer prizes are awarded yearly for work done in journalism, letters and music. (Stip. para. 17, T. 38).

During the 1962 baseball season, the Los Angeles Dodgers played before 2,755,184 paying fans at home in Los Angeles and 1, 593,665 paying fans while playing on the road. The Los Angeles Dodgers home attendance represented a new National League attendance record. The National League in 1962 smashed all attendance records attracting 11,360,159 paying fans. (Stip. para. 19, T. 38).

In all of the official Dodger Programs and publications from the year 1959 to the present, Maury Wills shows his residence as being located in Veradale, Washington (Stip. para. 21 T. pg. 39).

Appellant, Maury Wills, was born on the 2nd day of October, 1932, and lived his early years in Washington, D.C. His father was a Baptist minister. There were thirteen children in the family (Ex., pps. 15-16). At the conclusion of his high school career at Cardoza High School in the District of Columbia—where he was all city in three sports—Wills was offered nine football scholarships (Ex. 10-J, p. 17).

The S. Rae Hickok belt which Maury Wills won as emblematic of the professional athlete of the year 1962 — and which was presented to him in 1963 — has a buckle which is approximately 12-14 inches wide and weighs three and one-half pounds. The belt cannot be worn but is used by the athletes that have won it as a “trophy” (R. 21). The belt is presented in a mahogany case so that it can be displayed as a “trophy” (R. 27, Exs. 11-K, 12-L and 13-M). No recipient of the belt has ever melted the gold or sold the diamonds (R. 28).

The Hickok belt is emblematic of the professional athlete of the year. The belt was designed to be a significant award and was made valuable because it is a prestige award. It was felt that in honoring the professional athlete of the year something besides a certificate of merit was required (R. 27). The belt itself contains no inscription

other than the athlete's name and its presentation is not exploited by the Hickok Manufacturing Company. Public exploitation of the belt has been toned down so that there would be no hint of commercialism and this in turn adds dignity to the award. (R. 22).

The Hickok belt is awarded at an annual sports banquet in Rochester, New York. It is not necessary that the athlete who is to receive the award attend the banquet, and at least on one occasion the recipient of the award was not present, but the belt was sent to him. (R. 20). It is the intention of the Hickok Manufacturing Company that the entire concept of the S. Rae Hickok award be kept in the families of the originators (R. 19).

Maury Wills kept the Hickok belt in his home in Spokane, Washington, but transferred it to Los Angeles when he thought this proceeding might be held in that city. (R. 32). In 1964 Mrs. Wills removed one diamond from the belt and made a ring for herself (R. 33). Wills has never exploited the belt or exhibited it in public. It is his intention that it remain with his other trophies in Spokane, Washington, since it now belongs to the entire Wills family (R. 64, 65, 56 to 57, 59).

During both the winter seasons of 1962 and 1963 Wills worked for the Dodgers in Spokane, Washington, helping promote their minor league team, the Spokane Indians. Wills was paid approximately \$5,000.00 a year for this work (R. 30, 31).

Maury Wills had a long and strenuous career in minor league baseball prior to his chance in what is commonly referred to as "big-time" (Ex. 10-J, pps. 32 to 38).

Baseball is the national pastime and is an art (Ex. 10-J, pps. 144 to 155).

Stealing bases is an art and requires many factors. Maury Wills has made a study of the art of base stealing (Ex. 10-J, pps. 83 to 90, R. 15, 33, 38, 24).

A baseball player is expected to conduct himself as a gentleman on and off the field. The public expects much of a baseball player since he is a great influence on the youth of America (R. 14, Ex. 10-J, 38 to 41).

Maury Wills attended many civic endeavors as a Dodger baseball player. In one of the taxable years here present (1963) Maury Wills spent two weeks in Germany on behalf of the Air Force to entertain troops (R. 59, 60, 65).

Wills refuses to endorse liquor, beer or cigarette signs because he thinks that it is bad for the youth of the country (R. 39 and 40).

Maury Wills has always considered Spokane, Washington, as his home (Ex. 10-J, pps. 97 to 102). His home is located in Spokane, Washington. He has joined a service club there and owns business property in Spokane, Washington (R. 43, 44, 60, 61). Wills children have always attended school in Spokane, Washington, and he maintains a bank account there. (R. 66).

While in Los Angeles Wills lived with the Rev. Charles, his minister (Ex. 10-J, pps. 22 to 25, R. 31, 62 and 63).

Wills did not join service clubs in Los Angeles (R. 64).

SPECIFICATION OF ERROR RELIED UPON

A. The Tax Court erred in holding and deciding that Appellant Maurice M. Wills' tax home was in Los Angeles, California, while he was playing for the Los Angeles Dodgers baseball team, and not Spokane, Washington, where he maintained a year-round home for his family and where he resided during the off-season.

B. The Tax Court erred in holding and deciding that the fair market value of the Hickok belt awarded to Appellant, Maurice M. Wills, in 1963 as the "Outstanding Professional Athlete" constituted gross income to Appellant in 1963 and in deciding that the fair market value of an M.G. automobile awarded to Appellant, Maurice M. Wills, in 1962 as the "Most Popular Dodger" was taxable as gross income as an award and prize given in recognition of achievement.

SUMMARY OF ARGUMENT

The Tax Court of the United States, in the instant proceeding, held that Appellants' home for Federal Income Tax purposes, during the tax years involved herein was located in Los Angeles, California, where he was a member of the Los Angeles Dodger baseball organization.

Appellants lived in Spokane, Washington, during the

taxable years 1962 and 1963. Appellant is a professional baseball player and sometime entertainer. As such, he travels each year to spring training and after spring training, plays baseball for the Los Angeles Dodgers, but is on the road with the Dodgers at least half the time playing baseball in other National League cities.

The facts in the instant proceeding are indeed unique. Appellants did not have their home in Los Angeles during either of the taxable years 1962 or 1963 and the Tax Court of the United States erred in holding that they did, thereby disallowing certain away-from-home expense deductions.

During the taxable years 1962 and 1963, Appellant, Maury Wills, received two awards, i.e., an M.G. automobile and the S. Rae Hickok belt symbolic of his selection as Professional Athlete of the Year. The Appellee taxed Appellant on the fair market value of the automobile and the belt. The Tax Court of the United States agreed with the Appellee that both items were taxable.

The Hickok belt is not taxable to the Appellant because it is a trophy. Trophies are not specifically referred to in the law as such, but the framers of the Statute on prizes and awards certainly didn't intend to tax an item which had not utilitarian function. The belt cannot be used and is only significant to its holder. Taxing the belt as the Tax Court has done would force most athletes to disassemble a trophy won to pay the tax.

The belt and the car are also excludible under Section

74(b) of the Internal Revenue Code as prizes and awards because they were given for artistic or civic achievement. The Tax Court of the United States was in error in holding the items taxable.

ARGUMENT

I

APPELLANTS' HOME FOR FEDERAL INCOME TAX PURPOSES DURING EACH OF THE TAXABLE YEARS 1962 AND 1963 WAS LOCATED IN SPOKANE, WASHINGTON.

The first question involved in this proceeding is whether expenditures made by the Appellants in 1962 and 1963 for travel, meals and lodging in Los Angeles, California were deductible as travel expenses under either Section 62(2) (B) or Section 162(a) (2) of the Internal Revenue Code. It is the Appellants' contention that the Tax Court erroneously held that the Appellants' home for Federal Income Tax purposes was in Los Angeles. Appellant is a professional baseball player and sometime entertainer. Both professions required travel during each of the taxable years 1962 and 1963. During each of said taxable years Maurice Wills was married and had five children.

Appellants made their permanent home in Spokane, Washington. They owned a home and the children all attended schools in the Spokane area during the years involved herein. Appellant, Maurice Wills, was a member of a Spokane civic club, maintained a bank account in Spokane, and was part owner of a motel in Spokane. Appellants did

not and do not intend to leave Spokane.

Appellant's work is indeed unique. As a baseball player he was under contract with the Los Angeles Dodgers. A baseball contract is the last vestige of "involuntary servitude" left in America today. The Dodgers could fire Appellant almost at will. Appellant, as a player, could do nothing about it. If he did, he would be through in baseball.

Appellant, Maury Wills, leaves for spring training in March of each year. The baseball season opens and extends through September. If lucky, the team might make the World Series. The National League's schedule is such that Appellant spends only one-half of his time in Los Angeles. The remainder of the time is spent on the road playing in other National League cities.

The Appellee in the Tax Court proceeding took the position that the Appellants' home for tax purposes during the taxable years involved, i.e., 1962 and 1963, was in Los Angeles, California.

The question presented herein is unique. The Tax Court in its Opinion noted that this was matter of first impression.

The question of "tax home" appears to have been undergoing widespread change. In *Wallace v. Commissioner* (C.A.-9, 1945) 144 F. 2d 407, this Court unequivocally stated that "home" as used in the statute should be given its ordinary and usual meaning. Since that time many things

have happened. Nothing, however, has happened which would overcome the basic uniqueness involved in the factual pattern presented herein.

Appellant was able to find only one case whose factual situation resembled the instant proceeding.

In *Patricia A. Ruby Hall v. Commissioner* (1964) T. C. Memo 1964-157, 23 T.C.M. 930*, the Tax Court allowed deductions for travel expenses while away from home paid and incurred in connection with taxpayer's performance as a professional ice skater employed by the Ice Follies. In the *Hall* case, petitioner's home address was Spokane, Washington. She was employed as a professional ice skater in the Ice Follies by Shipstad and Johnson, which had its only office and place of business in Los Angeles, California. Shipstad and Johnson owned two buildings in Los Angeles where its plant and offices were located and where it employed a number of workers in addition to the individuals who actually performed in the Ice Follies.

Each year a new edition of the Ice Follies was produced and all rehearsals took place in Los Angeles prior to a three week premier of the new show. All contracts were executed in Los Angeles, pay-checks were issued there and all records were kept there.

Each year after the new edition of the show was presented in Los Angeles, the show went on tour over a regular circuit.

*Companion case *Judy L. Gooderman*, T.C. Memo 1964-158.

There was a vacation lay-off of approximately six weeks, during which the petitioner was not paid wages. The Court in determining that Spokane was taxpayer's "tax" home noted that she had always lived in Spokane, that she continued to maintain her home there. The Court in allowing the entire away from home expense stated as follows:

The problem here lies within a narrow zone. We believe it closely resembles the situation which exists where an individual engages in a trade which necessitates his belonging to a union and accepting employment for short periods away from his home, city and area where he maintains a fixed and permanent residence.

In applying Section 62(2) and 162(a) (2) to various situations, there does not appear to be a single rule which will correctly fit every case and it is necessary to decide each case on its particular facts under general principles.

In summary: petitioner did not abandon her permanent home in Spokane at any time. She continuously contributed to its upkeep and maintenance. She intended to return to Spokane and to her permanent residence there, each year during the lay-off and at other times, whenever possible. That she would return to Spokane during the lay-off period was a part of the employment contract. She had a business home base in Spokane as well as her personal home for the relevant purposes of Section 62(2) and 162(a) (2). She was neither a homeless or an itinerant individual. Petitioner's employment by the Ice Follies was upon the condition that she would travel with the show wherever and whenever directed and it was known in advance that in each city the employment would be for temporary period. Petitioner could not move her residence to her places of employment, and on the other hand, she needed to have a home city for business purposes and

to maintain a home there to which she could return during the lay-offs without pay. She had no choice about the cities where she would perform and was under the constant supervision of her employer who imposed rigid disciplines. Under the particular facts of this case, we hold that the disputed expenses were away-from-home travel expenses.

The Tax Court, in its Opinion which is the subject of this Appeal, distinguished the *Hall* case. It is submitted that the distinction was erroneous. The Tax Court felt that the Ice Follies were not identified with Los Angeles and further that in *Hall* (and its companion case) the Taxpayer needed a home for business purposes. As applied in the instant case, it seems immaterial that identification with Los Angeles should be a crucial distinction. The identification of an activity, i.e., baseball, with a particular city seems insignificant on the question of away-from-home expenses.

Certainly, Maury Wills, with nothing but a National League contract, which could be broken at the whim of the owner, was in need of a home for business and tax purposes. He was in Los Angeles less than half the time. If the Tax Court felt that the Taxpayer in the *Hall* case had a home away from Los Angeles then certainly Maury Wills under the facts presented herein had a home in Spokane, Washington, during each of the taxable years 1962 and 1963.

The Tax Court in its Opinion relied heavily upon the decision of the Supreme Court in *Commissioner v. Flowers* (1946) 326 U.S. 465. The *Flowers*' decision under its particular facts would not seem to apply in the instant case. In *Flowers* the Taxpayer lived in one city and worked in an-

other. The Supreme Court held that by choosing to live at a distance from his place of employment the Taxpayer could not convert commuting and living expenses into business expenses since such expenditures would not be required by the "exigencies of the business" (T. 50).

In the instant case Maury Wills signs a baseball contract for one year. He goes to spring training. His career is completely in the hands of the owners of the baseball team. He can be fired, traded or sold at their whim. As a matter of fact, Maury Wills was traded to the Pittsburgh Pirates not a week after this case was heard before the Tax Court of the United States. His existence depends upon his physical artistry as a baseball player. He is in an entirely different classification than the Taxpayer in the *Flowers* case. The *Flowers* rationale should not control the instant case.

Under the unique facts here present, Appellant, Maury Wills, had to maintain a home base where he could return each year. This is a question of fact and Appellant submits that the facts involved in this case show definitely that Maury Wills' home for tax purposes during the taxable years 1962 and 1963 was located in Spokane, Washington, and that the deductions disallowed by the Appellee in his statutory Notice of Deficiency should not be allowed.

The Tax Court of the United States was erroneous in its holding that Appellant, Maury Wills' home for tax purposes during the said taxable years was located in Los Angeles, California.

ARGUMENT

II

APPELLANT DID NOT RECEIVE TAXABLE INCOME IN 1962 UPON THE RECEIPT OF AN M.G. AUTOMOBILE NOR IN 1963 UPON RECEIPT OF THE S. RAE HICKOK BELT.

In 1962 Maury Wills dazzled the baseball world. He stole 104 bases and broke a record held by the great Ty Cobb since 1915—a record that most baseball experts believed would never be bettered. The record itself culminated a long and strenuous career of a man gifted with speed, great desire and dedication. The record was a product of hard work and study. Maury Wills in a few short years changed the concept of baseball and drove the home-run hitter off the front page. Rewards were many.

Among the awards that Maury Wills received for his exploits in 1962 was an M.G. automobile and the S. Rae Hickok award (for purposes of convenience award hereinafter sometimes referred to as the “belt”). The belt was presented to Wills in Rochester, New York by the Hickok Manufacturing Company in 1963 for being the 1962 “Professional Athlete of the Year”. The belt is a large diamond studded trophy which has become one of the truly coveted athletic awards in America.

The belt was the brainchild of Murray Goodman, a former New York sports columnist who turned to advertising and public relations. The Hickok brothers — extreme sports enthusiasts — wanted to honor their father with an award that

excelled. The idea put forth by Murray Goodman — i.e., the Hickok belt, symbolic of the professional athlete of the year, has honored Mr. Hickok beyond all expectations.

The Appellee asserted taxable income to Appellants based on the fair market value of the automobile and the belt.

The Appellant argued that both the automobile and the belt were non-taxable items. The Tax Court agreed with the Appellee that both the automobile and the belt were taxable.

Appellant contends that the Tax Court was in error. Appellants' first argument is that the belt is a "trophy" and as such, is not taxable. Appellant further contends that both the belt and the car are excluded from gross income for Federal Income Tax purposes under the provisions of Section 74 of the Internal Revenue Code of 1954.

The belt itself is large and cumbersome. It cannot be worn. The presentation of the belt takes place in Rochester, New York, but it is not mandatory that the recipient attend the banquet. The belt is presented to the winning athlete in a trophy case. None of the winners have ever sold the belt, but it has become a permanent and important part of their individual "trophy" collections.

The Hickok Manufacturing Company does not exploit the belt for publicity purposes. Nothing is done to detract in any way from the overall dignity of the award itself.

Section 74 of the Internal Revenue Code of 1954 entitled

“Prizes and Awards” is silent on the question of a trophy. The problem has apparently never been before the courts.

A holding for the Appellee in this proceeding will flood the Courts with new litigation. Admittedly, this trophy has value — but only to its recipient, Maury Wills. Most trophies have value. Certainly the winner of the “Oscar” presented by the Motion Picture Association of America to an actor or actress, if auctioned off, would bring a handsome sum. No such auction has ever taken place. Trophies are for the recipient to keep, to possess and cherish.

The belt has become a part of the Maury Wills family. It is owned jointly by them, as is every such trophy that has been presented to Wills over his baseball years. Taxing the same as income in the year of receipt would be stretching the tax law to an extreme.

The award is for good conduct in sports. It is a super award with dignity to the “Professional Athlete of the Year”.

Certainly the award should be taxed *if* sold. The recipient of the award has a zero basis and would receive income upon disposition of the belt. But taxing the belt upon receipt would force athletes to dismantle the trophy in order to pay the tax. This result would seem disastrous.

The Tax Court admitted the equitable position of the Appellants herein and recognized that the belt had no utilitarian value. The Tax Court, however—despite their solicitation for Appellant’s position — held that the fair Market

value of the belt and the car resulted in taxable income. The Tax Court erred in this holding.

Section 74 of the Internal Revenue Code of 1954 (Appendix "A") excludes certain prizes and awards from taxable income. To be excluded, the award must have been in recognition of religious, charitable, scientific, educational, *artistic*, literary or *civic* achievement. Admittedly, all of the elements of Section 74 are present in this case, but it was necessary in order that the exclusion come within Section 74 that the Appellant herein fit the Awards within the "*artistic* or *civic* achievement" categories.

It is Appellants' contention that both the belt and the automobile come within the exclusions of Section 74, above.

Baseball is the national pastime. It requires great skill. To attain the status of a Maury Wills one must necessarily be possessed of great artistic ability. The stealing of bases doesn't depend on brute strength. It depends on speed and knowledge. The Tax Court heard Appellant's explanation of the ingredients that go into stealing bases. The preparation is fantastic.

Wills is not only an artist, he has reconstructed a lost art and by so doing revolutionized the game of baseball which in 1962 and 1963 was witnessed by over 11,360,159 fans in the National League alone.

Who is to judge art? Who is to say a ballet dancer or a writer is an artist and Maury Wills with his special skills is not. It is submitted that the framers of Section 74, referred

to above, would not want this distinction made. The art practiced by Maury Wills had added something to the American way of life.

An additional exception contained in Section 74, above, is for "civic" achievement. Maury Wills spends the greater part of his living day engaged in civic activities. He is required under his contract to make public appearances on behalf of baseball and the Dodger organization. He signs autographs and endorsements. In 1963 the Air Force sent Mr. Wills to Germany for two weeks to entertain the troops. His life is one continual round of civic activities.

There is no more significant civic achievement throughout the United States today than the junior baseball program which in almost all instances is sponsored by local civic organizations. A great number of these future major league baseball players emulate Maury Wills. Wills is aware of this and because of his responsibility to the youth of America, has continually refused to endorse cigarette or liquor ads.

The Tax Court, in holding against the Appellants, as to the taxability of the belt and the car, relied upon their recent decision in *Paul V. Hornung* (1967) 47 T.C. 428. In that case a professional football player of considerable renown received an automobile in recognition of his having been selected the most valuable player in a National Football League championship game. The Court held that the receipt of the automobile did not come within the exclusion-

ary provisions of Section 74(b) of the Internal Revenue Code.

Appellants submit that the *Hornung* decision is incorrect. The Tax Court felt that the framers of Section 74 (b) meant to import everyday meaning into the words "artistic" and "civic". The skill required of a Maury Wills and his dedication to his public responsibilities would seem to fit very easily into the every day meaning of "artistic" and "civic".

Appellant, without attempting to take away credit from Mr. Hornung, argued in the Tax Court that Maury Wills' accomplishments over a whole year was distinguishable from Mr. Hornung's performance in one football game. The Tax Court felt that there was no distinction. Appellants submit that there is a distinction. Performance over a whole season and selection as the Professional Athlete of the Year augments the artistic exclusionary argument and multiplies by many the civic achievements accomplished by Mr. Wills during the period involved in this proceeding.

The car and the belt were within the exclusionary language of Section 74 (b) of the Internal Revenue Code and the Tax Court erred in holding that receipt of these items resulted in taxable income to the Appellants herein.

CONCLUSION

The Judgment of the Tax Court of the United States should be reversed.

Respectfully Submitted:

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CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Dated: April 18, 1968.

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APPENDIX "A"

STATUTES INVOLVED

Section 62, I.R.C. 1954

"For purposes of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions:

* * *

"(2) Trade and business deductions of employees.—

* * *

"(B) Expenses for travel away from home.—The deductions allowed by part VI (sec. 161 and the following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee."

Section 74(b), I.R.C. 1954

"Exception.—Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement, * * *"

Section 162, I.R.C. 1954

"(a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

"(2) Traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; * * *

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAURICE M. WILLS and GERTRUDE E. WILLS,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,427

MAURICE M. WILLS and GERTRUDE E. WILLS,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

STATEMENT OF THE ISSUES PRESENTED

1. May the taxpayer, an outstanding Los Angeles Dodger baseball player during the years involved, deduct pursuant to Section 162(a)(2) of the Internal Revenue Code of 1954 the expenses he incurred for meals, lodging, and transportation within the vicinity of Los Angeles as traveling expenses incurred "while away from home" because he maintained his residence in the vicinity of Spokane, Washington?
2. Was the fair market value of an MG automobile that was awarded to the taxpayer for being voted the "most popular Dodger" in 1962 received by him "primarily in recognition of religious, charitable,

scientific, educational, artistic, literary, or civic achievement" and, therefore, excludable from his gross income pursuant to Section 74(b) of the 1954 Code?

3. Was the fair market value of the Hickok belt that was awarded to the taxpayer for being voted the outstanding professional athlete of the year 1962 received by him primarily in recognition of one or more of the achievements set out in Section 74(b) of the Code and, therefore, excludable from his gross income pursuant to that provision?

STATEMENT OF THE CASE

This petition for review (I-R. 67-70) involves federal income taxes for the years 1962 and 1963 in the amounts of \$1,441.28 and \$4,753.75, respectively (I-R. 65). On March 7, 1966, the Commissioner of Internal Revenue mailed to the taxpayers a notice of deficiencies in those taxes. (I-R. 7-11.) On April 21, 1966, the taxpayers filed their petition with the Tax Court for a redetermination of those deficiencies. (I-R. 1-11.) In its opinion of June 14, 1967, reported at 48 T.C. 308, the Tax Court, insofar as is relevant here, sustained the Commissioner's determination of deficiencies. (I-R. 43-59.) The court's decision was entered on July 26, 1967. (I-R. 65.) The taxpayers filed their petition for review of that decision on October 20, 1967. (I-R. 67-70.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

The relevant facts, some of which were stipulated (I-R. 31-39), as found by the Tax Court (I-R. 44-48), are as follows:

The taxpayers are husband and wife who filed joint income tax returns on a cash basis for the calendar years 1962 and 1963 with the District Director of Internal Revenue for the State of Washington. (I-R. 31; Exs. 1-A, 2-B.)

The taxpayer has been a professional baseball player since 1951. From June, 1959, through November, 1966, he played baseball for the Los Angeles Dodgers, a major league team. (I-R. 31-32, 45; II-R. 30; Pet. Br. 23.)

In 1962 the taxpayer, among other accomplishments as a Dodger, broke the major league baseball record for the most stolen bases in one season. He was the subject of leading national magazine articles. He appeared in the 1962 All-Star game where he was voted "player of the game." He was voted the "most valuable player" of the National League and received various awards from the press and other groups. (I-R. 32-34, 36, 46.)

In October, 1962, the taxpayer was awarded an MG automobile having a fair market value of \$1,731^{2/}, for being voted the "most popular Dodger." The automobile award was based solely on the vote taken among the baseball patrons at a particular game held at the Dodger stadium in Los Angeles shortly before the award was made.

1/ Since a joint income tax return was filed by husband and wife, both are petitioners here. In this brief, however, the term "taxpayer" refers only to the husband.

2/ It was stipulated that the car had a retail value of \$2,196 and a wholesale value of \$1,731. (I-R. 33.)

A printed program distributed to the patrons at that game had a provision allowing them to vote for the "most popular Dodger" and the taxpayer won that vote. (I-R. 33-34, 46-47.)

In January, 1963, the taxpayer received the S. Rae Hickok belt having a fair market value of \$6,038.19^{3/}. The Hickok belt is awarded annually to the outstanding professional athlete of the year, the predominant criterion for electing each year's recipient being his excellence in athletics. The ballots for electing the winner of the Hickok belt were sent to over 250 sportswriters and sportscasters throughout the United States, and the outcome of that vote determined who received the award. The taxpayer could have disposed of the Hickok belt at any time after he received it. (I-R. 36-38, 47; Exs. 6-F, 7-G.)

The taxpayer first purchased a house in Spokane, Washington, in 1958, and he and his family used this house as a personal residence until 1962^{4/}. In January, 1962, the taxpayer purchased a second house in Veradale, Washington, on the outskirts of Spokane. At that time the taxpayer and his family (of five children) vacated their first Spokane residence and moved into the second house, in which they

3/ The belt was jewel-studded. After the taxpayer received the belt, one of its gems was removed by, and used in a ring for, the taxpayer's wife. (I-R. 36, 47.)

4/ During the 1959 baseball season, until the taxpayer was called up by the Dodgers in June, 1959, he played 48 games for Spokane, Washington, a Los Angeles Dodgers AAA farm club, in the Pacific Coast League. (I-R. 31-32.)

resided during the years involved.^{5/} When the taxpayer was in Spokane, he stayed at that residence. The taxpayer spent 138 days and 96 days of the years 1962 and 1963, respectively, in Spokane, and lived during that time at his Veradale residence. (I-R. 34-35, 45-46.)

Approximately one-half of the Dodgers' games were played each season at their home stadium in Los Angeles and the taxpayer spent not less than 87 days in 1962 and in 1963 in Los Angeles as a member of the Dodger baseball team. In 1963, he also spent four additional days in Los Angeles in connection with the World Series. He spent the remainder of the 1962 and 1963 baseball seasons at (or traveling to and from) the various other National League cities where the other Dodger games were played.^{6/} (I-R. 32, 34-35, 45, 51; Exs. 8-H, 9-I.) The taxpayer spent five or six weeks every spring in Florida for spring training and approximately a week in the winter of 1962 and two weeks in the winter of 1963 in Las Vegas, Nevada, where he participated in a night club routine with five other members of the Dodger team. He also performed in the routine in Miami, Florida, in 1963. (I-R. 34-35; see also II-R. 5, 46-47.) In 1963, the taxpayer also spent additional time--possibly as much as 21 days--in Los Angeles rehearsing for his nightclub routine. (I-R. 35-36, 45.)^{7/}

5/ The taxpayer retained the first house as rental property until he sold it in 1965. (I-R. 34, 45.)

6/ The length of the baseball season was approximately 177 days in 1962 and 184 days in 1963. (I-R. 34-35.)

7/ In the light of the table specifying taxpayer's locations during the years 1962 and 1963 (I-R. 35), it is not clear whether or not the 21 days that he spent in 1963 in Los Angeles rehearsing for the

(continued)

When in Los Angeles, the taxpayer lived with the pastor of the church that he attended there. Taxpayer paid rent for those accommodations. (I-R. 46.)

On his income tax returns, the taxpayer reported \$38,095 for 1962 and \$45,794 for 1963 as salaries received from the Los Angeles Dodgers. (Ex. 1-A, pp. 1, 6; Ex. 2-B, pp. 1, 8.) His player's contracts with the Dodgers provided that he was to receive \$29,750 for the 1962 season and \$30,000 for the 1963 season, to be paid to him semi-monthly at the Dodger headquarters in Los Angeles. (I-R. 45; Exs. 3-C, 4-D.) In addition to his contract salaries, the taxpayer also received \$5,000 in 1962 and in 1963 from the Dodgers for public relations work performed by him in the Spokane vicinity for the Spokane Indians, a Dodger Minor League team. Had the taxpayer lived in the Los Angeles area, similar employment--public relations work for the Dodgers--would have been available to him there. The taxpayer also received and reported \$19,400 as gross income received in 1963 from his night club appearances in Las Vegas and Miami.^{8/} (I-R. 34, 46, 52; Ex. 4-D, pp. 1, 10.)

7/ (continued)

nightclub routine (I-R. 35-36) came within the baseball season or at some other time. Accordingly, the Tax Court found only that taxpayer spent some (I-R. 45) "additional time" in Los Angeles preparing for that routine. (See also II-R. 48.)

8/ The taxpayer testified that he owned business property in Spokane--he was a partner in the Flora Motel. (II-R. 61.) He reported a \$1,093 loss for 1962 and a \$450 loss for 1963 from the motel operation, and \$557 long-term capital loss upon its sale in 1963. (Ex. 1-A, p. 3; Ex. 2-B, pp. 3, 6.) Taxpayer also reported a \$1,015 loss for 1963 from the rental of his original Spokane residence. (Ex. 2-B, p. 4.)

The Tax Court sustained the Commissioner's determination that the fair market value of the MG automobile and the Hickok belt were includible in the taxpayer's gross income, and that the deductions claimed for meals, lodging, and transportation expenses incurred in the vicinity of Los Angeles were not allowable.^{9/} (I-R. 48-59.)

Taxpayers petition for review of that decision. (I-R. 67-70.)

9/ For the year 1962, the taxpayer claimed traveling expense deductions of \$1,305 for meal expenses and \$900 for lodging expenses incurred in Los Angeles. (Ex. 1-A, p. 6.) The Commissioner disallowed this entire amount (\$2,205), but allowed the taxpayer an unclaimed traveling expense deduction of \$966 for the 138 days he was in Spokane, for a net disallowance of \$1,239. (I-R. 9, 35, 48.)

For the year 1963, the taxpayer claimed traveling expense deductions of \$1,305 for meal expenses, \$1,050 for lodging expenses, and \$412 for cab fares and automobile expenses incurred in the Los Angeles area. (Ex. 2-B, p. 8.) The Commissioner disallowed this entire amount (\$2,767) but allowed the taxpayer an unclaimed traveling expense deduction of \$672 for the 96 days that he was in Spokane, for a net disallowance of \$2,095. (I-R. 10, 35, 48.) (The stipulation of facts (I-R. 35) is in error insofar as it states that the taxpayer claimed only \$2,095 of Los Angeles traveling expense deductions for 1963.)

In addition to his claimed traveling expenses for 1963, the taxpayer also claimed deductions of \$1,360 for meal expenses incurred in connection with his night club appearances (Ex. 2-B, p. 10), of which \$315 was disallowed by the Commissioner because (I-R. 10) "it has not been established that * * * [it] constitutes an ordinary and necessary business expense or was expended for the purpose designated." (See also I-R. 35-36.) The \$315 expense may have been incurred in Los Angeles while taxpayer was rehearsing for his night club performances (I-R. 35-36), but the taxpayer introduced no evidence to rebut the Commissioner's determination that it did not constitute an ordinary and necessary expense. The Tax Court either considered the issue to have been abandoned (I-R. 44) or decided, sub silentio, that it was governed by its holding that the taxpayer's principal place of business was Los Angeles (I-R. 51, 53-54), which precluded the deduction of any living expenses incurred in that vicinity.

ARGUMENT

I

SINCE THE TAXPAYER'S PRINCIPAL PLACE OF BUSINESS WAS LOS ANGELES, THE TRANSPORTATION, MEALS, AND LODGING EXPENSES HE INCURRED IN THAT VICINITY ARE NOT DEDUCTIBLE

A. Introduction

One of the issues in the instant case is whether the taxpayer, an outstanding Los Angeles Dodger baseball player, may deduct from his gross income the costs of transportation, meals, and lodging that he incurred in the vicinity of Los Angeles, where he pursued his livelihood. Section 162(a)(2) of the Internal Revenue Code of 1954, ^{10/} Appendix, infra, provides that a taxpayer may deduct as ordinary and necessary business expenses "traveling expenses (including amounts expended for meals and lodging * * *) while away from home in the ^{11/} pursuit of a trade or business."

If the expenses in question are not (Section 162(a)(2)) "traveling expenses" deductible under that provision, they are non-deductible "personal" or "living" expenses. Section 262 and Sections 1.62-1(g), 1.162-2(e) and 1.262-1 of the Treasury Regulations on Income Tax (1954 Code), Appendix, infra; Commissioner v. Flowers, 326 U.S. 465,

10/ Except as otherwise indicated, reference to sections are to the Internal Revenue Code of 1954.

11/ As amended by Section 4(b), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960, Section 162(a)(2) refers to "traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances)." Prior to that amendment, the statute referred to "traveling expenses (including the entire amount expended for meals and lodging)." The amendment is effective only for taxable years ending after December 31 1962, and is therefore applicable here for the year 1963.

(continued)

469-470 (1946); James v. United States, 308 F. 2d 204, 206-207 (C. A. 9th, 1962); Smith v. Warren, 388 F. 2d 671, 672 (C. A. 9th, 12/ 1968).

It is well established that expenses incurred by a taxpayer in the vicinity of his principal place of business are generally not deductible as traveling expenses. Commissioner v. Flowers, *supra*; see also Commissioner v. Stidger, 386 U.S. 287 (1967). Of course, where a taxpayer pursues two or more businesses at widely separated locations, the costs of traveling between them and the living expenses incurred at the minor business post are deductible because a taxpayer cannot be expected to avoid such expenses by moving away from his principal place of business. In that sense, such expenses are required by the exigencies of his businesses. Steinhort v. Commissioner, 335 F. 2d 496, 504 (C. A. 5th, 1964); Chandler v. Commissioner, 226 F. 2d 467 (C. A. 1st, 1955); see Wright v. Hartsell, 305 F. 2d 221, 225 13/ (C. A. 9th, 1962).

11/ (continued)

Items deductible pursuant to Section 162(a)(2) as traveling expenses may be deducted from gross income to arrive at adjusted gross income. Section 62(2)(B) and Section 1.62-1 of the Treasury Regulations on Income Tax (1954 Code), Appendix, *infra*.

12/ Unlike the situation in Smith v. Warren, *supra*, the taxpayer here does not contend that if the transportation expenses in question are not deductible as traveling expenses pursuant to Section 162(a)(2) they are deductible from gross income as business transportation expenses pursuant to Sections 62(2)(C) and 162(a).

13/ However, on a one-day trip to the minor duty post not requiring sleep or rest, no expenses are deductible under Section 162(a)(2) as traveling expenses. United States v. Correll, 389 U.S. 299 (1967). Transportation expenses on such trips may be deductible under Sections 62(2)(C) and 162(a) as ordinary and necessary business expenses. Bell v. Commissioner, 13 T.C. 344 (1949); Duncan v. Commissioner, 17 B.T.A. 1088 (1929); see Smith v. Warren, *supra*.

Here, in accord, we submit, with the foregoing principles, the Commissioner allowed the taxpayer deductions for estimated living expenses incurred while he was in Spokane--on the ground that it was a minor business post. Further, determining that Los Angeles was the taxpayer's principal place of business, the Commissioner allowed him the deductions he claimed for expenses incurred in traveling to other cities in pursuit of his business. See fn. 9, supra, p. 7. Accordingly, the only traveling expenses at issue here are those incurred in the vicinity of Los Angeles.

Taxpayer, despite his seven-year career as a Los Angeles Dodger--from June, 1959, through November, 1966 (I-R. 31-32; Pet. Br. 23)--chose for that entire period to maintain his residence and, when not playing baseball or engaged in certain other business activities, to live with his wife and family in the vicinity of Spokane, Washington (I-R. 34, 45; II-R. 4-5, 30, 44). He never moved his family to the vicinity of Los Angeles, the Dodgers' home city and headquarters, where approximately 50 percent of their ball games were played each season. (I-R. 38, 51; Exs. 8-H, 9-I.) Because of the location of his residence in Veradale, taxpayer contends (Br. 18-23) that the expenses in question are deductible as expenses incurred (Section 162(a)(2)) "while away from home in the pursuit of a trade or business." We disagree. As the Tax Court here noted (I-R. 49, 50), in Commissioner v. Flowers, 326 U.S. 465, 470, 474 (1946), the Supreme Court stated that to be deductible, traveling expenses must be incurred "while away from home" and they must also be incurred because of the "exigencies of the business," as distinguished from "the personal conveniences and necessities" of the taxpayer. We contend that neither of these requirements for

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deductibility was satisfied here, insofar as the expenses incurred in the vicinity of Los Angeles are concerned.

B. The expenses in question are not deductible because they were not incurred because of, or motivated by, the exigencies of business

In the Flowers case, supra, the taxpayer's residency in Jackson, Mississippi, and his family, social, religious, and business ties with that community were of a longer term and were more extensive than were the comparable associations of the instant taxpayer with Spokane (or Veradale) Washington. (Compare 326 U.S., pp. 467-468, with I-R. 34-35, 45-46, and II-R. 42-45, 51-52, 58-61, 66-67.) Indeed, in that case, the taxpayer--primarily out of personal choice--spent more of his time in Jackson and did more work for his employer there than he did in Mobile, Alabama. Nevertheless, as the Supreme Court noted (326 U.S., p. 468) the "taxpayer's principal post of business" was at Mobile for, with one exception, he could have--and normally would have--pursued his principal business activities there, rather than in Jackson. Accordingly, the Court held that the expenses incurred by the taxpayer in traveling between Jackson and Mobile, and his extra living expenses incurred in Mobile, were not incurred in pursuit of business--that is, they were not required or motivated by the exigencies of business--but, instead, were incurred for personal reasons, namely, the taxpayer's desire to continue to reside in Jackson.

The principal-post-of-business (or exigencies-of-business) rationale of the Flowers case is, we submit, clearly applicable to the instant case, as the Tax Court here held. (I-R. 51-52.) See also Rev. Rul. 54-147, 1954-1 Cum. Bull. 51. Without detailing all of

the facts supporting the Tax Court's finding here (I-R. 51, 53-54) that Los Angeles, instead of Spokane, was the taxpayer's principal place of business, the following facts are significant:

Only about a year after taxpayer moved to Spokane, he was called up to the Dodgers--in June, 1959, during the baseball season--and he continued to play ball for the Dodgers through November, 1966.^{14/} (I-R. 31-32, 45; II-R. 1, 30, 42-43.) Beginning with 1959, his first season, and during the years involved, his performance as a ballplayer for the Dodgers was more than satisfactory and, with respect to the number of bases he stole, it was extraordinary, particularly in 1962. The taxpayer was clearly a popular member and mainstay of the Dodger team and his outstanding performance in 1962 was undoubtedly a key factor in the home attendance record set by the Dodgers for that year. (I-R. 32-34, 36, 38, 46-47; II-R. 14, 40-42, 45-46, 63; Ex. 7-G.)

Each season, the Dodgers played approximately one-half of their games at their stadium located in Los Angeles, the club's home city^{15/} (I-R. 51; Exs. 8-H, 9-I), and the taxpayer spent at least 87 days in 1962 and in 1963 in Los Angeles as a member of the Dodger team (I-R. 45).

14/ The taxpayer's contractual relationship with the Dodgers was on a yearly basis and each time the Dodger Club exercised its contractual option to retain the taxpayer for the next season, it was obligated to pay him at least 75 percent of his preceding year's salary. (Exs. 3-C, 4-D.)

15/ The club did not play nearly that many games in any other National League city and, of course, did not play any ball games in Spokane. (Exs. 8-H, 9-I.)

The Dodgers paid the taxpayer a salary of approximately \$38,000 in 1962 and \$45,000 in 1963. (Exs. 1-A, 2-B; see also Exs. 3-C, 4-D.) The salaries were paid to the taxpayer primarily for his services as a ball player. Even the \$5,000 paid to him in 1962 and 1963 for public relations and promotional activities on behalf of the Dodgers in Spokane (I-R. 46; II-R. 30-31) was not dependent on the taxpayer's being located in Spokane. Instead, his effectiveness in performing that work was primarily dependent upon his well-known status as a member of the Dodger team and he would have been able to perform much the same type of promotional work for the Dodgers had he lived in the Los Angeles area. (I-R. 46, 52; II-R. 30-31, 49-52, 58-59.) As the Tax Court stated (I-R. 52), the taxpayer's "services in Spokane were a by-product of his association with the Dodgers."

The taxpayer spent time in Los Angeles in 1963 rehearsing for his night club routine (I-R. 35-36, 45), from which he reported a gross income of \$19,400 in 1963 (Ex. 2-B, p. 10), earned some income from other sources there, and had business contacts and other associations with Los Angeles (I-R. 46; II-R. 31-32, 46-49, 53-55, 57-58, 62-63, 66).

Aside from the promotional activities carried on by the taxpayer in Spokane on behalf of the Dodgers, referred to above, the taxpayer carried on no significant business or other income-earning activities in Spokane.^{16/} It could not, then, have been primarily business reasons that motivated taxpayer to continue to reside in Spokane and thereby incur the extra living expenses in question. Instead, the attractiveness of that area to the taxpayer was its proximity to excellent outdoor recreational facilities, especially for hunting and fishing, sports which the taxpayer (II-R. 45) "practically live[d] for." (See also, II-R. 66-67.) Accordingly, even though in years prior to 1958 (the year in which the taxpayer moved to Spokane), his family ordinarily moved with him when he changed ball clubs (II-R. 42-43), the taxpayer had no intention of abandoning Spokane as his family residence (Pet. Br. 18-19). This is true even though he has been employed since December, 1966, as a ball player for the Pittsburgh Pirates team. (Pet. Br. 23; see also II-R. 1, 30.)

Had the taxpayer maintained his personal (and family) residence in Los Angeles while pursuing his livelihood there, the meal and lodging expenses he incurred in that vicinity would not be deductible. The taxpayer's situation would be the same, with respect to such expenses, as that of other taxpayers (James v. United States, 308 F. 2d 204, 206 (C. A. 9th, 1962)) "whose business does not require travel, and who therefore pay tax upon all of the income which they devote to their personal living

^{16/} See fn. 8, *supra*, p. 6.

expenses." Likewise, in that situation his expenses incurred in traveling between his work locations in Los Angeles and his residence there would be (Smith v. Warren, 388 F. 2d, p. 672)--

"commuting" costs, which have long been classified as non-deductible under section 262 of the Code, 26 U.S.C. § 262 (1964), as "living and personal expenses lacking the necessary direct relationship to the prosecution of the business." Commissioner of Internal Revenue v. Flowers, 326 U.S. 465, 473, 66 S.Ct. 250, 254, 90 L.Ed. 203 (1946). See sections 1.62-1(g), 1.162-2(e) and 1.262-1(b) (5) of Treasury Regulations on Income Tax (1954 Code).

Here, the result should be the same with respect to the travel and living expenses incurred by the taxpayer in the Los Angeles area because that area was his principal place of business. He continued to maintain his residence in the vicinity of Spokane, Washington, during the seven years that he played baseball for the Los Angeles Dodgers and thereby incurred the extra living expenses in question primarily for personal, not business, reasons. Cf. Commissioner v. Flowers, 326 U.S. p. 473.

Since the question here--the location of the taxpayer's principal place of business--is essentially factual (United States v. Mathews, 332 F. 2d 91 (C. A. 9th, 1964)); Peurifoy v. Commissioner, 358 U.S. 59 (1958), affirming 254 F. 2d 483 (C.A. 4th, 1957); Green v. Commissioner, 35 T.C. 764 (1961), affirmed, 298 F. 2d 890 (C.A. 6th, 1962)), the Tax Court's finding (I-R. 51, 53-54) that Los Angeles was the taxpayer's principal place of business is

subject to the clearly erroneous rule (Commissioner v. Duberstein, 363 U.S. 278 (1960)). Since the taxpayer earned, by far, more of his income in Los Angeles than he did in any other one city, devoted (leaving aside spring training in Florida) approximately one-half of his active business year--the baseball season--to pursuing his principal business there, and had other business associations with Los Angeles, while, by contrast, aside from his public relations work, he carried on no significant business activities in Spokane, the Tax Court did not clearly err in finding that Los Angeles was his principal place of business. Commissioner v. Flowers, supra.

C. Further, since the taxpayer's "home" for purposes of the statute was located in Los Angeles, he did not incur the expenses in question "while away from home"

In the light of the foregoing discussion, we submit that the expenses in question were not incurred because of, or motivated by, the exigencies of business, as required by the statute for deductibility. Commissioner v. Flowers, supra. Further, we submit, no deduction is allowable because the expenses were not incurred "while away from home" within the meaning of the statute.

As the Supreme Court noted in the Flowers case, supra, the Commissioner's long-standing administrative rulings have been (326 U.S., p. 472, fn. 5) "explicit in treating the statutory home as the abode at the taxpayer's regular post of duty." The Tax Court and at least five Courts of Appeals--the First, Second, Third, Fourth, Seventh and Eighth Circuits--agree with this administrative position,

and the Supreme Court has sustained it with respect to a military officer's post of duty. Commissioner v. Stidger, 386 U.S. 287, 290-292 (1967) (and see the rulings and cases there cited), reversing 355 F. 2d 294 (C. A. 9th, 1965)^{17/}. Accordingly, we contend that if we are correct in our position that Los Angeles was the taxpayer's principal place of business, then the expenses in question were not incurred "while away from home." While we recognize that this Court disagrees with that definition of "home" (e.g., see Stidger v. Commissioner, 355 F. 2d 294 (C. A. 9th, 1965), reversed, 386 U.S. 294 (1967), and Wright v. Hartsell, 305 F. 2d 221 (C. A. 9th, 1962)), we contend further that under this Court's alternative criteria for deductibility, namely, whether it would have been reasonable for the taxpayer to move his residence to Los Angeles (see Stidger v. Commissioner, 355 F. 2d, pp. 298-300), no deduction is allowable here. See Part B, supra, and Part D, infra.

D. None of the exceptions to the foregoing rules apply here to allow the taxpayer a deduction for the expenses incurred in Los Angeles

Whether the issue here is approached from the standpoint of the "while away from home" requirement, as interpreted by the Commissioner in Part C, supra, or of the "exigencies of business" requirement (Part B, supra), none of the exceptions to either requirement apply here to allow the taxpayer to deduct the expenses in question.

^{17/} In Stidger, the dissenting opinion, in contending that "home" means one's residence, qualified that definition by acknowledging that (386 U.S., p. 297) "a taxpayer should establish his residence as near to his place of employment as is reasonable." Here, taxpayer, by refusing to move to the vicinity of Los Angeles, has failed to meet even the dissent's requirement.

The Commissioner recognizes that where a taxpayer's employment at a particular location is temporary, rather than indefinite, indeterminate, or otherwise more permanent, in anticipated duration, his transportation expenses incurred in traveling to that area and his expenses incurred in living there may be deductible because, in that situation, the expenses are occasioned by his pursuit of business, not by a personal choice of locating his home far from his business location. Rev. Rul. 60-189, 1960-1 Cum. Bull. 60, 61-64; Peurifoy v. Commissioner, 358 U.S. 59 (1958), affirming 254 F. 2d 483 (C. A. 4th, 1957); Coburn v. Commissioner, 138 F. 2d 763 (C. A. 2d, 1943); Schurer v. Commissioner, 3 T.C. 544 (1944). While taxpayer contends (Br. 19, 23) here that the Dodgers could fire or trade him at will, the taxpayer's business location in Los Angeles was clearly not temporary within the meaning of Rev. Rul. 60-189 and the cases applying the temporary-versus-indefinite employment location test.

As already stated herein (Part B, supra), the taxpayer's performance for the Dodgers was more than satisfactory his first season (1959) with them and was thereafter--especially during the years involved--outstanding. He was an extremely popular Dodger, whose exploits helped the Dodgers set a new home attendance record in 1962. (See I-R. 38; II-R. 41-42.) Under these circumstances, so long as taxpayer's performance continued to be satisfactory, he could reasonably expect to continue to be employed by the Dodgers and, in fact, his career as a Dodger extended over a period of seven years, from

1959 through 1966. (See Part B, supra, p. 12.) In this era of mobility of the American taxpayer, the taxpayer's business location in Los Angeles as a member of the Dodger team was probably more permanent than that of many other taxpayers--particularly those employed by large corporations--with presumably permanent positions in established business locations. Transfers occur even in such relatively stable employment situations and they cannot always be anticipated. But that does not mean that such taxpayers have only temporary job locations. Similarly, an established major league baseball player, like the taxpayer here, who is a definite asset to his team, is not likely to be quickly transferred, even though transfers of such players are occasionally made. Here, for example, only after the taxpayer served seven years with the Dodgers was such a transfer made. (See Pet. Br. 23.) A baseball team's success at the home ticket office is necessarily dependent upon its reasonable success in winning ball games and upon the popularity of its best players. (See I-R. 38; II-R. 41-42.) Since such success is dependent upon players like the taxpayer in the instant case, it cannot be assumed that the Dodgers would readily trade him. Accordingly, the taxpayer cannot reasonably contend that his employment location with the Dodgers during the years involved was temporary within the meaning of Rev. Rul. 60-189, supra, and the cases cited supra.

For the same reasons set out immediately above, the taxpayer cannot show here that it was (Harvey v. Commissioner, 283 F. 2d 491, 495 (C. A. 9th, 1960)) "very likely that * * * [his] stay away from * * * [Spokane would] be short." Instead, at the beginning of the taxable years involved, when taxpayer had already served three seasons with the Dodgers, there was (283 F. 2d, p. 495) "a reasonable probability known to him that he [might] * * * be employed for a long period of time" with the Dodgers at Los Angeles. Accordingly, it was, we submit (Stidger v. Commissioner, 355 F. 2d, p. 298) "reasonable to expect the taxpayer to move his residence to his place of employment" in Los Angeles. It follows that even under this Court's Harvey case test, with which the Commissioner disagrees (Rev. Rul. 61-96, 1961-1 Cum. Bull. 749), the taxpayer should not prevail.

The cases relied on by the taxpayer (Br. 20-22) (Hall v. Commissioner, decided June 8, 1964 (P-H Memo T.C., par. 64,157), and Gooderham v. Commissioner, decided June 8, 1964 (P-H Memo T.C., par. 64,158)) are distinguishable on their facts for the reasons stated by the Tax Court (I-R. 52-54). Unlike the taxpayer here involved, those taxpayers did not have a principal business location where half of their professional performances were carried on each season. Instead, they performed in various cities, spending only a short period of time in each city, much like construction workers with temporary work locations. Cf. Rev. Rul. 60-189, supra; Mathews v. Commissioner, 310 F. 2d 98 (C. A. 9th, 1962). Further,

in those cases, the expenses were clearly incurred in the pursuit of their trades or businesses and the fundamental question was whether the taxpayers maintained a "home" where they resided to be away from. The Tax Court, relying strongly on Gustafson v. Commissioner, 3 T.C. 998 (1944), concluded that they did and that they were, therefore, not itinerants. Cf. James v. United States, 308 F. 2d 204 (C. A. 9th, 1962); Hicks v. Commissioner, 47 T.C. 71 (1966). By contrast with those cases, in the instant case, our primary position is that the taxpayer's extra living expenses were non-deductible personal expenses incurred because he refused, primarily for personal reasons, to move his residence to Los Angeles, his principal place of ^{18/}business.

II

THE FAIR MARKET VALUE OF THE "MOST POPULAR DODGER" AWARD, AN MG AUTOMOBILE, AND OF THE "OUTSTANDING PROFESSIONAL ATHLETE" AWARD, THE HICKOK BELT, ARE INCLUDIBLE IN TAXPAYER'S GROSS INCOME

In 1962, the taxpayer received an MG automobile, provided and presented by an automobile agency, as an award for being elected the "most popular Dodger" by the baseball patrons at the Dodger's final home game of the 1962 season. (I-R. 33-34, 46-47; see also Ex. 8-H.) In 1963, he received the S. Rae Hickok award, a jeweled belt, provided and presented by the Hickok Belt Company of Rochester, New York, for

^{18/} Unlike the situation in Hall and Gooderham, we do not contend here that taxpayer was an itinerant, for he maintained a substantial abode in Spokane.

being elected the "outstanding professional athlete" of 1962 by votes taken among a group of more than 250 sportswriters and sportscasters. (I 36, 38, 47; Exs. 6-F, 7-G.)

Taxpayer contends (Br. 24-29) that both awards are excludable from his gross income pursuant to Section 74(b), Appendix, infra. We contend that that provision is inapplicable and that both awards are therefore includible in gross income pursuant to Sections 61(a) and 74(a)^{19/}, Appendix, infra.

19/ The language of Section 61(a) (and its predecessor provisions in prior Revenue Acts) clearly expresses "the intention of Congress to tax all gains except those specifically exempted" (Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955); Commissioner v. LoBue, 351 U.S. 243 (1956); United States v. Woodall, 255 F. 2d 370 (C. A. 10th, 1958), certiorari denied, 358 U.S. 824. See also James v. United States, 366 U.S. 213, 219 (1961); Rudolph v. United States, 370 U.S. 269, 273 (1962)).

The Committee Reports on the 1954 Code make it clear that Congress intended to exercise its fullest taxing power in Section 61. The Committee Reports stated (H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A18-A19 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4155); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 168-169 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4802)):

Section 61(a) provides that gross income includes "all income from whatever source derived." This definition is based upon the 16th Amendment and the word "income" is used in its constitutional sense.

It is clear that neither award was made with the requisite disinterested generosity (Commissioner v. Duberstein, 363 U.S. 278 (1960)) that would allow it to be excluded from gross income as a gift pursuant to Section 102, and there is no contention here that the gift exclusion applies. Cf. Simmons v. United States, 308 F. 2d 160, 164 (C. A. 4th, 1962). Further, the specific purpose and effect of Section 74(a) was to make it clear that all awards and prizes not coming within one of the specified categories set out in Section 74(b) are includible in gross income and not excludable therefrom as gifts. Section 1.74-1(a) of the Treasury Regulations on Income Tax (1954 Code), Appendix, infra; H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 11, (continued)

Section 74(b) provides that "Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement." Taxpayer contends (Br. 25, 27-28) that the awards in question were made primarily in recognition of "artistic" or "civic" achievements.

Turning first to the question of whether the awards were made primarily in recognition of "civic" achievements, while taxpayer had "a creditable record of social service" (I-R. 56; see also II-R. 14-15, 31, 39, 65), the fact remains that taxpayer has failed to prove that he received either award because of, or in recognition of, such services.

The taxpayer received the MG automobile for being elected the "most popular Dodger" in 1962. As the Tax Court here stated (I-R. 58), popularity itself is not one of the categories of achievements set forth in Section 74(b). Further, in 1962, the taxpayer astounded the baseball world with an amazing demonstration of base-stealing, shattering a major league record established by Ty Cobb approximately 47 years before. (I-R. 32, 46; Ex. 7-G.) Insofar as the record discloses, it was this outstanding demonstration of athletic skill that delighted the fans and prompted them to elect him the most popular Dodger in 1962. (II-R. 41-42.) Indeed, most of his fans,

19/ (continued)

A27 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4036, 4163-4164); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 13, 178-179 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4642, 4813); 1 Senate Hearings before the Committee on Finance on the Internal Revenue Code of 1954, 83d Cong., 2d Sess., p. 12; Commissioner v. Duberstein, 363 U.S. 278, 290 (1960) (dictum); Hornung v. Commissioner, 47 T.C. 428, 435 (1967). Cf. Simmons v. United States, 308 F. 2d, p. 164.

in voting for him, may not even have known, or may not have been primarily concerned about, his social services. They were baseball fans, and he was popular with them primarily because he performed extremely well for them as a ballplayer.

As for the Hickok award, the Tax Court's finding here that (I-R. 56) it was "made primarily in recognition of athletic skills and that excellence in sport is the predominant criterion for selection", and, therefore, that it was not made primarily in recognition of his social services, is amply supported by the record (I-R. 36-38, 47; II-R. 14, 16, 18-21, 25-26, 68-70; Exs. 6-F, 7-G). Accordingly, neither award is excludable as one made primarily in recognition of a civic achievement. Hornung v. Commissioner, 47 T.C. 428, 436-437 (1967); see Simmons v. United States, 308 F. 2d 160, 163 (C. A. 4th, 1962).

Taxpayer contends (Br. 27-29) that both awards were made primarily in recognition of an (Section 74(b)) "artistic" achievement because, he contends, stealing bases is an art and he is, therefore, an artist. We do not dispute that stealing bases, as taxpayer did, requires great preparation and athletic skill, and that taxpayer performed this skill remarkably well. (I-R. 32, 46; II-R. 33-38.) It is clear, however, from both the terms of Section 74(b) and its purpose, as disclosed by its legislative history, that the term "artistic * * * achievement" in that provision is limited to the special category of activities which are inherently or substantively artistic or aesthetic in nature, and would include the fine arts--namely,

painting, drawing, architecture, sculpture, poetry, music, dancing, dramatics, and similar "artistic" activities.

Section 74(b) sets forth seven different categories of achievements: "religious, charitable, scientific, educational, artistic, literary, or civic." While some of these terms are more specific than others (e.g., "scientific" would appear to be more precise than "charitable" or "civic"), each refers to, and describes the substantive quality or character of, the achievement in question. For example, just as "scientific" and "educational" describe (Hornung v. Commissioner, 47 T.C., p. 436) "certain types of personal achievement[s]", "artistic" also describes a substantive category of activities and achievements, and does not, as taxpayer contends, refer to the particular manner in which, or skill with which, other types of activities, such as an athletic sport, might be conducted. In determining the meaning of "artistic" the maxim noscitur a sociis clearly applies. See Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961), affirming 278 F. 2d 148, 151-153 (C. A. 1st, 1960); Neal v. Clark, 95 U.S. 704, 708-709. As stated in Simmons v. United States, 308 F. 2d, p. 163, "the crucial test is the nature of the activity being rewarded." (Emphasis supplied.)

While seven specific categories were included in the statute, certain other categories, which might have been included--such as "professional", "business", and "athletic"--were not. Inclusio unius est exclusio alterius. It is, therefore, evident that Congress did not wish to allow exclusions for awards made primarily for recognition of achievements in those activities, regardless of the skill or dedication to that activity that the achievement represents. Hornung v. Commissioner, 47 T.C., p. 437.

All of the categories listed in Section 74(b) have one other aspect in common--"they all represent activities enhancing in one way or another the public good". Simmons v. United States, 308 F. 2d, p. 163. It was awards made in recognition of outstanding achievement in such activities--for example, the Nobel and Pulitzer prizes--that Congress intended to exclude from income by enacting Section 74(b). See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 11, A27 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4036, 4163-4164); S. Rep. No. 1622, 83d Cong. 2d Sess., pp. 13, 178-179 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4648-4813); 1 Senate Hearings before the Committee on Finance on the Internal Revenue Code of 1954, 83d Cong., 2d Sess., pp. 12, 482-483. In the light of the foregoing, we submit, an award for outstanding success in professional baseball, like one in professional football or in a fishing competition, cannot be considered to have been made primarily in recognition of either an "artistic" or a "civic" activity within the meaning of Section 74(b). Hornung v. Commissioner, 47 T.C., p. 437; Simmons v. United States, 308 F. 2d, pp. 162-164.

Taxpayer also contends (Br. 25-26) that the Hickok award is a "trophy" in that taxpayer intends that it will be possessed and cherished, not sold. It is beyond serious dispute, however, that the belt had a fair market value of approximately \$6,000 (I-R. 36, 47; Ex. 5-E; cf. Pet. Br. 10) and that it could be sold, or dismantled and sold (see I-R. 47; II-R. 32-33; Ex. 5-E). Accordingly, its fair market value--the best objective measure of its value--is the correct amount to be included in taxpayer's income. Section 1.74-1(a) of the Treasury Regulations on Income Tax (1954 Code), Appendix, infra; cf. Koons v. United States, 315 F. 2d 542, 545 (C. A. 9th, 1963). While the belt may be a trophy in the sense the taxpayer uses that term, it is, nevertheless, for reasons already stated, an award, and is, therefore, ^{20/} includible in gross income pursuant to Sections 61(a) and 74(a).

20/ Those who provide such awards can readily protect the recipients from substantial tax liability, either by restricting the alienability of the article constituting the award, thereby reducing its market value, or by providing for it to be transferred yearly from one recipient to the next, as is done with some awards.

Non-tax considerations, of course, may militate against such procedures. For example, it is not unknown for athletes sometimes to fall on hard times after their years of ability are past. Here, while the Hickok Belt Company wished to provide the recipients with something of value to honor them (II-R. 27), it also provided them with something of substantial economic value which might benefit them financially at any time.

In the light of the foregoing discussion, the Tax Court, we submit, was correct in holding that the awards in question are includible in gross income pursuant to Sections 61(a) and 74(a). This does not mean, of course, that a future Congress may not be persuaded that there are equitable and policy considerations justifying the exclusion of athletic awards such as the MG automobile and the Hickok belt involved here, despite the practical value of the former and the high intrinsic value of the latter. For example, on September 13, 1967, Senator Smathers, referring specifically to the Tax Court decision in the instant case, introduced a bill (S. 2397, 90th Cong., 1st Sess.) providing, inter alia, that Section 74(b) be amended by striking out "civic" and inserting in lieu thereof "civic or athletic", such amendment to apply to prizes and awards received after its enactment into law. See 113 Cong. Record, No. 144, pp. S 12886-12887 (September 13, 1967^{21/}). Similar bills have been introduced in the House

^{21/} In introducing his bill, the Senator stated (113 Cong. Record, p. S 12887):

Mr. President, I certainly do not mean to be critical of the Tax Court in this matter. The court correctly observed that Congress has not expressed itself in this area by placing athletic awards on a par with those given for religious, charitable, scientific, educational, artistic, literary, and civic achievement, for which section 74 now provides an exclusion from gross income.

My own feeling is that prizes of this nature do not constitute income in the generally accepted sense of that term, and should not be regarded as such. This amendment would furnish a vehicle for legislative action to bring about this result.

of Representatives during the First Session of the 90th Congress. ^{22/}

But, unless and until Congress decides that such considerations are sufficiently persuasive to justify the exclusion of such awards, they remain taxable.

CONCLUSION

For the reasons stated above, the decision of the Tax Court is correct and should be affirmed.

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JULY, 1968.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this ____ day of July, 1968, in an envelope, with postage prepaid, properly addressed to him as follows:

Francis J. Butler, Esquire
Butler & Lukins
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Spokane, Washington 99201

MITCHELL ROGOVIN
Assistant Attorney General

^{22/} See H.R. 12453 (113 Cong. Record, No. 131, p. H 10812 (August 16, 1967)); H.R. 13190 (113 Cong. Record, No. 154, p. H 12743 (September 28, 1967)); H.R. 13890 (113 Cong. Record, No. 177, p. H 14390 (November 1, 1967)); H.R. 13823 and H.R. 13825 (113 Cong. Record, No. 178, p. H 14529 (November 2, 1967)); H.R. 13875 (113 Cong. Record, No. 179, p. H 14586 (November 3, 1967)); H.R. 13946 (113 Cong. Record, No. 183, p. H 15055 (November 9, 1967)); H.R. 13979 (113 Cong. Record, No. 184, p. H 15160 (November 13, 1967)).

APPENDIX

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) General Definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

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(26 U.S.C. 1964 ed., Sec. 61.)

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

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(2) Trade and business deductions of employees.--

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(B) Expenses for travel away from home.--The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

*

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(26 U.S.C. 1964 ed., Sec. 62.)

SEC. 74. PRIZES AND AWARDS.

(a) General Rule.--Except as provided in subsection (b) and in section 117 (relating to scholarships and fellowship grants), gross income includes amounts received as prizes and awards.

(b) Exception.--Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement, but only if--

(1) the recipient was selected without any action on his part to enter the contest or proceeding; and

(2) the recipient is not required to render substantial future services as a condition to receiving the prize or award.

(26 U.S.C. 1964 ed., Sec. 74.)

SEC. 162 [as amended by Sec. 4(b), Revenue Act of 1962, P. L. 87-834, 76 Stat. 960]. 23/ TRADE OR BUSINESS EXPENSES.

(a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

* * *

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; * * *

* * *

(26 U.S.C. 1964 ed., Sec. 162.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 1964 ed., Sec. 262.)

23/ This amendment applies to the taxable year 1963, involved herein, but does not have any material effect on the issue. See fn. 11, supra, p. 8.

Treasury Regulations on Income Tax (1954 Code):

§ 1.62-1 Adjusted gross income.

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*

*

(b) Section 62 merely specifies which of the deductions provided in chapter 1 of the Code shall be allowed in computing adjusted gross income. It does not create any new deductions. The fact that a particular item may be specified in more than one of the paragraphs under section 62 does not permit the item to be twice deducted in computing either adjusted gross income or taxable income.

(c) The deductions specified in section 62 for the purpose of computing adjusted gross income are:

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(3) Deductions allowable under part VI which constitute expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

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*

(g) Transportation expenses paid or incurred by an employee in connection with performance by him of services for his employer are deductible from gross income under part VI in computing adjusted gross income. * * * The term "transportation expense" includes only the cost of transporting the employee from one place to another in the course of his employment, while he is not away from home in a travel status. * * * Transportation expenses do not include the cost of commuting to and from work; this cost constitutes a personal, living, or family expense and is not deductible. (See section 262.)

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(26 C.F.R., Sec. 1.62-1.)

§ 1.74-1 Prizes and awards.

(a) Inclusion in gross income. (1) Section 74(a) requires the inclusion in gross income of all amounts received as prizes and awards, unless such prizes or awards qualify as an exclusion from gross income under subsection (b), or unless such prize or award is a scholarship or fellowship grant excluded from gross income by section 117. Prizes and awards which are includible in gross income include (but are not limited to) amounts received from radio and television give-away shows, door prizes, and awards in contests of all types, as well as any prizes and awards from an employer to an employee in recognition of some achievement in connection with his employment.

(2) If the prize or award is not made in money but is made in goods or services, the fair market value of the goods or services is the amount to be included in income.

(b) Exclusion from gross income. Section 74 (b) provides an exclusion from gross income of any amount received as a prize or award, if (1) such prize or award was made primarily in recognition of past achievements of the recipient in religious, charitable, scientific, educational, artistic, literary, or civic fields; (2) the recipient was selected without any action on his part to enter the contest or proceedings; and (3) the recipient is not required to render substantial future services as a condition to receiving the prize or award. Thus, such awards as the Nobel prize and the Pulitzer prize would qualify for the exclusion. Section 74 (b) does not exclude prizes or awards from an employer to an employee in recognition of some achievement in connection with his employment.

*

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(26 C.F.R., Sec. 1.74-1.)

§ 1.162-2 Traveling expenses.

(a) * * * Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses. * * *

*

*

*

(e) Commuters' fares are not considered as business expenses and are not deductible.

*

*

*

(26 C.F.R., Sec. 1.162-2.)

§ 1.262-1 Personal, living, and family expenses.

(a) In general. In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Code, for personal, living, and family expenses.

(b) Examples of personal, living, and family expenses. Personal, living, and family expenses are illustrated in the following examples:

*

*

*

(5) Expenses incurred in traveling away from home (which include transportation expenses, meals, and lodging) and any other transportation expenses are not deductible unless they qualify as expenses deductible under section 162, * * *. The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses. The costs of the taxpayer's lodging not incurred in traveling away from home are personal expenses and are not deductible unless they qualify as deductible expenses under section 217. Except as permitted under section 162, 212, or 217, the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses.

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(26 C.F.R., Sec. 1.262-1.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAUSTINO RAFAEL MURGIA-MELENDEZ,

Petitioner,

vs.

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE,

Respondent.

ON APPEAL FROM THE BOARD OF IMMIGRA-
TION APPEALS, UNITED STATES DEPART-
MENT OF JUSTICE, IMMIGRATION AND
NATURALIZATION SERVICE

BRIEF FOR THE RESPONDENT

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N O. 2 2 4 2 8
IN THE UNITED STATES COURT OF APPEALS
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FAUSTINO RAFAEL MURGIA-MELENDREZ,

Petitioner,

vs.

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE,

Respondent.

BRIEF FOR THE RESPONDENT

ISSUES PRESENTED

1. Was there an intelligent waiver of counsel by the petitioner at his deportation hearing on June 26, 1967?
2. Is Section 242(b)(2), Immigration and Nationality Act (8 USC 1252), and implementing regulation 8 CFR 242.16(a), constitutional?

STATUTES INVOLVED

Section 242(b) of the Immigration and Nationality Act, 8 U. S. C. 1252, provides in part:

" . . . Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that . . .

"(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose; . . . "

Section 242(b)(2) is implemented in part by 8 CFR 242.16(a) which provides in part:

"(a) Opening. The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; . . . "

Section 292 of the Immigration and Nationality Act, 8 U. S. C. 1362, provides:

"SEC. 292. In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

Section 292 is implemented by 8 CFR 292.5(b).

"Right to representation. Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs."

ARGUMENT

I

THE PETITIONER WAS OFFERED BUT DECLINED THE PRIVILEGE OF BEING REPRESENTED BY COUNSEL.

At his deportation hearing, with regard to counsel, the petitioner was advised by the Special Inquiry Officer as follows (Transcript pages 22-23):

"Q In these proceedings, you have the right

to be represented by counsel or other authorized representative of your choice, but at no expense to the United States Government. Have you obtained representation for this hearing?

"A Not for this hearing, sir.

"Q Are you willing to proceed with the hearing of this matter at this time without representation?

"A Yes, sir.

"Q You are also informed that during this proceeding you have certain rights including the right to inspect, examine and object to any evidence offered against you by the Government, to cross-examine any witnesses that the Government may present, and to present evidence for yourself. Do you understand?

"A Yes, sir."

In addition, regulations require that if there is personal service of the Order to Show Cause the respondent alien is to be advised of the contents of the Order to Show Cause; that any statement he makes may be used against him; and of his right to be represented by counsel of his own choice, without expense to the Government [8 CFR 242.1(c)]. The reverse side of the Order to Show Cause (Exhibit 1, Transcript page 33a) reflects that the Order to Show Cause was served on petitioner by mail.

The Order to Show Cause states in part:

"If you so choose, you may be represented in this proceed-

ing, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing. "

(Transcript p. 33a)

The fact that Petitioner presented a letter which was admitted into evidence (Transcript page 45, Exhibit 4) is some indication that he read and understood the foregoing quotation from the Order to Show Cause which had been served on him.

After completion of the hearing and decision adverse to the Petitioner, he employed counsel in connection with appeal to the Board of Immigration Appeals. The sole attack upon the deportation proceeding before the Board of Immigration Appeals is the same as in this action before this Court. That is, a non-intelligent waiver of counsel as well as a claim of violation of the Constitution in allegedly depriving petitioner of right to counsel. In fact, the brief for this Petitioner before the Board of Immigration Appeals is for the most part identical to the brief filed by counsel

in this litigation. (Transcript pages 6-17). The Board of Immigration Appeals pointed out that it does not rule on constitutional questions, but found no difficulty in overruling counsel's contention that petitioner did not understand the nature of the deportation proceeding, or the advice given him with regard to having counsel at his own expense. (Transcript pages 2-3).

Under the circumstances where the advice given to the respondent alien was strikingly similar to the warning given in this case, the Ninth Circuit Court of Appeals stated with regard to Section 242(b)(2) - (Millan-Garcia v. Immigration and Naturalization Service, 343 F.2d 825, 829 (9th Cir. 1965); remanded on other grounds, 382 U.S. 69):

"It is clear that the privilege of being represented by counsel expressed in the statute cited above is one which may be waived in a deportation proceeding. Giaimo v. Pederson, 289 F.2d 483, (6th Cir. 1961); United States ex rel. Dentico v. Esperdy, 280 F.2d 71, (2nd Cir. 1960); United States ex rel. Mustafa v. Pederson, 207 F.2d 112, (7th Cir. 1953); Coons v. Boyd, 203 F.2d 804, (9th Cir. 1953) Cf. Samala v. Immigration and Naturalization Service, 336 F.2d 7, (5th Cir. 1964). It is apparent from the transcript of the proceedings at both the March 24th hearing and during the resumption of the hearing on April 3rd, that the petitioner voluntarily and understandingly waived the privilege of representation by retained counsel. Since there is nothing to indicate that petitioner was unable to

afford a lawyer, no other question is presented.

"Petitioner argues that he was not granted a reasonable continuance of the hearing proceedings to employ counsel of his own choosing. But petitioner does not assert that a request was at any time made for such a continuance nor does the record reflect any such request. It does not appear that petitioner has made any effort to secure counsel or that he desired one. When questioned by the special inquiry officer regarding representation by counsel, petitioner indicated that he was willing to proceed without counsel." (at pages 829-830)

The Court's attention is specifically referred to cases cited in the above quotation.

Petitioner concedes that the Special Inquiry Officer informed him that he had a right to be represented by counsel or other authorized representatives of his choice. He also admits that the Officer sought to determine whether he had obtained representation for the hearing. The petitioner chose, however, to proceed without representation. The fact that he knowingly and voluntarily chose to waive his right to counsel in no way invalidates the hearing. See Giaimo v. Pederson, 289 F.2d 483, 484 (6th Cir.1961) and cases cited above. Thus, a hearing cannot be said to be unfair on the grounds of lack of counsel where there is a voluntary waiver of that right. U.S. ex rel. Jankowski v.

Shaughnessy, 186 F. 2d 580 (2nd Cir. 1951). Nor will a hearing without counsel pursuant to a waiver constitute a lack of due process. U.S. ex rel. Denticio v. Esperdy, 280 F. 2d 71 (2nd Cir. 1960).

II

SECTION 242(b)(2) DOES NOT REQUIRE THAT AN ATTORNEY BE PRESENT AT EVERY DEPORTATION PROCEEDING.

In the instant case, the Petitioner at no time indicated he was indigent. It does not appear from the record that Petitioner could claim that he was indigent since he was working (Transcript page 31) and living with his parents (Transcript page 30).

The presence of counsel is a privilege that the alien may elect to exercise. In a case (as in this case) where the alien was not represented at the hearing but was represented before the Board of Immigration Appeals and in court, the Ninth Circuit Court of Appeals stated (Bisaillon v. Hogan, 257 F. 2d 435 (9th Cir. 1960), cert. den. 358 U. S. 872):

"Appellant was by no means an indigent person, nor was she a defendant in a criminal case. She had counsel of her own choosing, not only before the Board of Immigration Appeals, but before the district court and here. She could as readily have obtained counsel to represent her before the special inquiry officer."
(at page 437)

The Special Inquiry Officer did not deny petitioner the privilege of having counsel, and he was under no duty, nor is he authorized, to appoint counsel. In fact, the law makes no provision of payment for attorney fees by the Government (See Burr v. I. N. S. , 350 F.2d 87, 91 (9th Cir. 1965)).

The mere fact that the alien is a minor does not make his waiver of counsel invalid. The court will take into consideration his education, intelligence, information, understanding, and ability to comprehend [DeSouza v. Barber, 263 F.2d 470 (9th Cir. 1959), cert. den. 359 U.S. 989].

Although the alien undergoing deportation proceeding may not elect to employ counsel, the courts generally will evaluate the hearing to determine whether the absence of representation resulted in a lack of fair hearing [Ellis v. Berman, 238 F.2d 235 (2nd Cir. 1956); see also Rose v. Woolwine, 344 F.2d 993, 4th Cir. 1965)]. See generally Gordon and Rosenfield, Immigration Law and Procedure (1967) Section 1.23(a) "Right to representation by counsel," pages 1-87-94.

In the instant case, the evidence against the Petitioner was documentary. This evidence, even if Petitioner had elected to remain silent, could have been established readily as relating to Petitioner. Consequently, the absence of counsel did not prejudice him. It was not testimony from the alien which provided the basis for the deportation charge -- it was the visa which established his alienage (Transcript pages 34-40, Exhibit2), and the record of conviction which established the substantive charge (Transcript

pages 41-44, Exhibit 3). Consequently, the Petitioner cannot show that he was prejudiced by the absence of counsel at the hearing and/or that the hearing was unfair.

III

SECTION 242(b)(2) AND THE IMPLEMENT- ING REGULATION ARE CONSTITUTIONAL.

In the case of Nason v. I. N. S., 370 F. 2d 865, (2nd Cir. 1967), the court stated it was for Congress to prescribe the standards affecting the fairness of a deportation hearing. The court stated as follows:

"Although the consequences of deportation are in many instances of very serious moment to the deportee, a deportation proceeding has uniformly been held to be civil and not criminal in character. Fong Yue Ting v. United States, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 (1893); Buagewitz, v. Adams, 228 U. S. 585, 33 S. Ct. 607, 57 L. Ed. 978 (1913); U. S. ex rel. Bilokumsky v. Tod, 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221 (1923); Harisiades v. Shaughnessy, 342 U. S. 580, 72 S. Ct. 512, 96 L. Ed. 586 (1952); Woodby v. Immigration and Naturalization Service, 385 U. S. 276, 87 S. Ct. 483, 17 L. Ed. 2d 362, decided December 12, 1966. It is, moreover,

within the competency of the Congress to prescribe rules and regulations affecting the fairness of a trial of disputed issues of fact, such as the burden of proof, the admissibility of evidence and the right of the deportee to counsel. In the absence of congressional action such questions have been traditionally 'left to the judiciary to resolve * * in the interest of the even-handed administration of the Immigration and Nationality Act.' Woodby v. Immigration and Naturalization Service, supra." (at page 868)

In the case of Ah Chiu Pang v. INS, 368 F. 2d 637 (3rd. Cir.1966), cert.den. 386 U.S. 1037, the court said:

"Petitioner also challenges the constitutionality of the order of deportation on the ground that when he was apprehended he was not afforded the benefit of counsel and notification of his constitutional rights as required in criminal cases by Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and Massiah v. United States, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 246. At the oral argument here, petitioner's counsel frankly conceded that no decision supported this argument, but that he was impelled to make the contention to preserve the record. The same argument was made before the Board of Immigration Appeals and we, like

it, are not prepared to extend to aliens in deportation proceedings the same immunities to be accorded defendants in criminal cases as claimed by petitioner." (At page 639)

Although these two cases (Nason and Ah Chiu Pang) involve the right to counsel during the preliminary investigation, as distinguished from the right to counsel during the formal hearing before the Special Inquiry Officer as in the case now before the court, they nevertheless are clearly in point. [See also Burr v. I. N. S., 350 F. 2d 87, 91 (9th Cir. 1965)].

It would appear that if a failure to inform an alien during the investigation into his deportability that he may have counsel is not violative of the Constitution, that the explicit statutory provisions providing that he may have counsel, at no expense to the Government, during the administrative hearing, should withstand the requirements of due process provisions of the Fifth Amendment.

The Supreme Court long ago stated that a proceeding to enforce regulations relating to the right of aliens to reside in the United States is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments; that all that is required is that the alien have a fair hearing [Zakonaite v. Wolf, 226 U. S. 272 (1912); see also, Bridges v. Wixon, 144 F. 2d 927, 931 (9th Cir. 1944), reversed other grounds 326 U. S. 135].

There is a long-established thesis that deportation pro-

ceedings are civil in nature and therefore are not governed by the principles pertinent to criminal prosecutions. See Fuentes-Torres v. I. N. S., 344 F.2d 911 (9th Cir. 1965), cert. denied 382 U.S. 846 (1965); Ben Huie v. I. N. S., 349 F.2d 1014 (9th Cir. 1965).

However, the courts have recognized that an alien who is within our borders is entitled to the protection of the Fifth Amendment as it concerns procedural due process [Chew v. Colding, 344 U.S. 590 (1953)]. Deportation, although it may visit hardship and deprivation upon a person, is not a criminal proceeding, and has never been held to be punishment [Carlson v. Landon, 342 U.S. 524, 537-8 (1952)].

Although the Supreme Court has pointed out the severity of deportation and prescribed a rigid standard of proof for the issuance of deportation orders, it still has refused to hold that a deportation proceeding is a criminal prosecution. [Woodby v. Immigration Service, 385 U.S. 276, 285 (1966)].

It cannot be said that what is a fair hearing (as measured by the due process clause of the Constitution) is static; however, what Congress adopted in Section 242(b) as the basic formula for a fair hearing, is in accord with the concepts of the courts as well as the Administrative Procedures Act [Marcello v. Bonds, 349 U.S. 302 (1955)].

CONCLUSION

It is respectfully submitted that, based upon the prior decisions of this Court, Courts of Appeals in other circuits, and the United States Supreme Court, the Board of Immigration Appeals correctly dismissed Petitioner's appeal, and that decision should be affirmed by this Court.

Respectfully submitted,

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COPY

No. 22429 ✓

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT G. BEATTIE,

Appellant,

vs.

LOUIS S. NELSON, Warden,
JAMES W. L. PARK, Administrator,
San Quentin Prison,

Appellees.

APPELLEE'S BRIEF

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UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT G. BEATTIE,

Appellant,

vs.

LOUIS S. NELSON, Warden,
JAMES W. L. PARK, Administrator,
San Quenin Prison,

Appellees.

No. 22429

APPELLEE'S BRIEF

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's complaint below was conferred by the Civil Rights Act (42 U.S.C. § 1983 and 28 U.S.C. § 1343). Proceedings in forma pauperis are authorized by 28 United States Code section 1915. The jurisdiction of this court is conferred by Title 28, United States Code section 1291.

STATEMENT OF THE CASE

Appellant, an inmate confined in the California State Prison at San Quentin, sought to file a complaint in forma pauperis under the Federal Civil Rights Act (42 U.S.C. § 1983), seeking injunctive relief and monetary damages against the above-named defendants. In his complaint appellant alleged that he had been denied permission

to purchase a copy of the opinion in Beattie v. California, 386 U.S. 285 (1967) which had vacated his judgment of conviction and remanded the case for further proceedings in the light of Chapman v. United States, 386 U.S. 18 (1967), and certain other legal materials which he alleged were necessary for the proper research and presentation of pending legal actions which he had undertaken (RT 1-12).

In support of his claims, appellant attached exhibits B through D to the complaint to establish that on July 10, 1967, he had requested permission to purchase the following legal materials (RT 6-8):

Beattie v. Calif. -U.S.-, 18 L.Ed.2d 51, 87 S.Ct. (1967) \$1.50

Smith's Review on Tort's (1958) \$3.00

Smith & Roberson Workbook by Donnelly & Casey (1965) \$2.50

Prosser on Torts, 3 Rd. Ed. (1964) \$12.50 HB

Federal Rules on Civil Procedure (1966) Ed. Pamphlet \$8.00

Exhibit "A" attached to his complaint showed that while he had been denied permission to buy the requested reference materials, he had been given permission to purchase a copy of the opinion in Beattie v. California, supra. Exhibit "A" also showed that this action was taken in accordance with the pertinent prison rules which do not

permit inmates to own personal copies of law books or reference materials, but do permit them to receive or purchase a copy of an opinion or decision in their own case (RT 5).

By order dated September 29, 1967, the United States District Court for the Northern District of California, the Honorable Robert F. Peckham, presiding, ruled that the complaint failed to state a constitutional claim cognizable under the civil rights statutes and denied appellant leave to file the complaint in forma pauperis (RT 13-14). The District Court based its decision primarily upon this Court's decision in Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961), holding that prison inmates do not have a constitutional right to accumulate a personal law library. The Court further held that the present complaint failed to state a cause of action as in DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966) wherein alleged action of the respondent interfered with the inmate's access to the courts. Thus concluding that the complaint failed to allege any violation of constitutional rights, the Court held that pursuant to the discretion set forth in Shobe v. State California, 362 F.2d 545 (9th Cir. 1966), the complaint could not be filed in forma pauperis.

On November 15, 1967, following the filing of

a "motion to rehear or motion for certificate of probable cause" and other documents (CT 15-28), the District Court further ordered that appellant be permitted to file a notice of appeal in forma pauperis. This appeal accordingly follows.

SUMMARY OF APPELLANT'S ARGUMENT

The District Court improperly refused permission to file the complaint.

SUMMARY OF APPELLEE'S ARGUMENT

1. Appellant's appeal is barred because the subject matter is res judicata.

2. The District Court properly refused appellant permission to file his complaint, since the complaint failed to state a federal claim.

ARGUMENT

I

APPELLANT'S APPEAL IS BARRED BECAUSE
THE SUBJECT MATTER IS RES JUDICATA.

The District Court's order which denied appellant leave to file his complaint in forma pauperis was a decision basically on the merits. However, it is well established that a court may take judicial notice of its own proceedings in other cases, as well as the records of other courts in related proceedings. United States v. Pink, 315 U.S. 203, 216 (1942); see also, Lambert v.

Conrad, 308 F.2d 571 (9th Cir. 1962); St. Paul Fire & Marine Ins. Co. v. Cunningham, 257 F.2d 731, 732 (9th Cir. 1958). If judicial notice is taken, it is clear that there is a separate and independent ground for sustaining the District Court's order, other than the merits, and that is because the doctrine of res judicata is fully applicable here. Pursuant to that doctrine this Court may note the following:

On January 7, 1966 the Honorable Judge Albert C. Wollenberg of the United States District Court for the Northern District of California, denied appellant and a co-plaintiff leave to file a civil rights complaint brought against the appellees here named in an action entitled Richard Louis Bowden and Albert Greenville Beattie, Plaintiffs v. Lawrence E. Wilson, Warden, and James W. L. Park, Associate Warden, San Quentin Prison, Respondents, Misc. No. 1288. There, as here, appellant was denied permission to buy some legal books, while granted permission to buy others (not the ones here involved) and similarly alleged "that prison regulations prevent them and others similarly situated from purchasing law books of their choice which are to be used to prepare legal documents." Bowden and Beattie v. Wilson and Park, supra; and see the complaint and exhibits on file with the United States District Court in the above-named case. The

crux of the Court's opinion denying appellant's claims was as follows:

"It may be conceded that due process requires that inmates have access to the courts to present their grievances, but it does not logically follow that this in effect means that each inmate should be allowed to maintain a personal law library should he so desire.

"Moreover, the attachments presented with the complaint indicate that petitioners have been given permission to purchase certain legal publications to aid them with their research and that the facilities of the prison library are open and available.

"This court does not feel that Constitution requires more. There is no basis for argument that an inmate is entitled to maintain as extensive a personal law library as he wishes."¹/

Thereafter, in an action entitled Albert Granville Beattie, Petitioner v. Lawrence E. Wilson, Warden, and James W. L. Park, Associate Warden, San Quentin Prison,

1. A full copy of Judge Wollenberg's order is attached hereto as Exhibit "A".

Respondents, Misc. No. 2653, this Court on February 10, 1966, in essence, affirmed Judge Wollenberg's order, stating:

"Petitioner, a California state prisoner seeks leave to appeal in forma pauperis from an order of the district court denying leave to file a civil rights action seeking to obtain an order authorizing the unrestricted purchase of law books.

"The motion is denied as legally frivolous for the reasons expressed by Judge Wollenberg in the order denying leave to file the complaint."²/

According to this Court's docket sheet and the files of the California Attorney General's Office, an action instituted by appellant entitled "Albert G. Beattie v. United States District Court, Ninth Circuit Court of Appeals" to review the Courts' orders in the United States Supreme Court was later abandoned.

Accordingly, we submit that where, as here, the parties and issues are identical, the doctrine of res judicata is fully applicable. Rhodes v. Meyer, 334 F.2d

2. A copy of this Court's order is attached hereto as Exhibit "B".

709 (8th Cir. 1964); Hill v. Nelson, 272 F.Supp. 790, 802 (N. D. Calif. 1967).

II

THE DISTRICT COURT PROPERLY REFUSED
APPELLANT PERMISSION TO FILE THIS
COMPLAINT, SINCE THE COMPLAINT FAILED
TO STATE A FEDERAL QUESTION.

In any event it is clear that the District Court properly refused appellant leave to file his complaint in forma pauperis since the complaint did not state a cause of action cognizable under the civil rights statutes.

In Shobe v. State of California, 362 F.2d 545 (9th Cir. 1966) this Court held that the privilege of filing and prosecuting a civil action under 28 United States Code section 1915 is a matter resting within the sound discretion of the court. Moreover, as the District Court stated, since it is only under extraordinary situations that the federal courts will interfere with the internal affairs of state penitentiaries, this Court has held that the the latitude of discretion accorded the ruling of a district court in granting or refusing permission to proceed in forma pauperis is especially broad in civil actions by prisoners against wardens and other officials connected with the institution in which they are incarcerated. Smart v. Heinz, 347 F.2d 114 (9th Cir. 1965).

In his present complaint, of course, appellant

did not allege that he had been denied all access to the use of legal materials or to the use of the prison law library facilities, nor, does he so allege in his opening brief (cf. AOB p. 4).

Similarly, appellant did not allege that he had been denied access to the courts, as did the complainant in DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966) who alleged that the confiscation of an appeals transcript and other documents prevented him from pursuing a direct appeal from his state conviction. Nor, indeed, did appellant assert here that it was necessary for him to do his own legal research in prison because he could not obtain legal counsel in any of his pending actions. Indeed, in view of the facts of which this Court may take judicial notice such allegations could not validly have been made.^{3/}

3. Thus, in addition to the proceedings to which we have already referred, this Court may take judicial notice that there is presently pending in this Court Gilmore v. Lynch, Case No. 22052, which involves, inter alia, the question of whether the District Court properly refused to convene a three judge court in the consolidated actions of John Van Geldern v. Thomas C. Lynch, et al., in Case Nos. 45878, 46297, 46298, and 46299, pending in the United States District Court for the Northern District of California, of which appellant is a party. In the proceedings in the District Court, the complainants, represented by counsel, are also seeking, inter alia, to attack regulation of the use of legal materials in prison.

Similarly, this Court may note that appellant, again represented by counsel, presently has pending a petition for writ of certiorari in the United States Supreme Court in Misc. No. 1077, in which he seeks to set aside his robbery conviction.

Rather, it was appellant's complaint that he should be able to buy and personally own the requested materials in order to "properly" present his case to the courts (RT 2). In this connection, appellant first alleged that on May 15, 1967 he had requested to buy "his own opinion" of Beattie v. California, 386 U.S. 285 (1967), and further indicated that he had been denied permission to buy a copy of the opinion. However, at Exhibit "A" of the complaint, it clearly appears that on July 17, 1967, permission was given to appellant to buy a copy of the opinion of his case, a course of action consistent with the pertinent rules of the Department of Corrections, similarly set forth in that exhibit.

Appellant also alleged that he had been denied permission to buy other reference materials for his personal use which he stated he needed in connection with pending (albeit, in the complaint, unnamed and unspecified) legal actions. The other reference materials were:

Smith's Review on Tort's (1958) \$3.00

Smith & Roberson Workbook by Donnelly & Casey
(1965) \$2.50

Prosser on Torts, 3 Rd. Ed. (1964) \$12.50 HB

Federal Rules of Civil Procedure (1966) Ed.
Pamphlet \$8.00

Appellant was not permitted to buy personal copies of these materials pursuant to the prison rule prohibiting

inmates from personally owning law books or reference material. Apart from the fact that appellant did not allege in what way these particular books on torts and civil procedure were necessary to him in his pending actions (and, particularly in attacking his criminal conviction), it is clear, in any event, that appellant's complaint does not state a cause of action cognizable under the federal civil rights statutes.

In Hatfield v. Bailleaux, 290 F.2d 632f (9th Cir. 1961), cert. denied, 368 U.S. 862 (1961), this Court held that the state is not under any constitutional obligation to provide law books to prisoners for their use in either civil or criminal litigation in which they may be a party plaintiff or party defendant. The court there stated:

"State authorities have no obligation under the federal Constitution to provide library facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform. All inmates are presumed to be confined under valid judgments and sentences. If an inmate believes he has a meritorious

reason for attacking his, he must be given an opportunity to do so. But he has no due process right to spend his prison time or utilize prison facilities in an effort to discover a ground for overturning a presumptively valid judgment." 290 F.2d at 640-641.

Numerous subsequent federal decision are in accord. See e.g., Lee v. Tahash, 352 F.2d 970, 973-74 (8th Cir. 1965); Roberts v. Pepersack, 256 F.Supp. 415, 433-34 (D. Md. 1966); and United States v. Pennsylvania, 247 F.Supp. 7, 11-13 (E. D. Pa. 1965); (wherein at footnote 18 at page 13, any authority to the contrary in United States ex rel. Mayberry v. Prasse, 225 F.Supp. 752 (E. D. Pa. 1963) is limited to the peculiar facts of that case). For example, the court made the following observations in Roberts:

"The right to petition or correspond with a court does not include a right to be furnished with an extensive collection of legal materials. Such a collection either in one's own cell or in the prison library will encourage 'fishing expeditions' in which an inmate seeks out cases where the allegations made received favorable consideration and adopts these allegations as his own. By denying Roberts this opportunity to raise spurious claims, the prison authorities

are perhaps hindering his access to a 'remedy.' Again, such a hinderance is justifiable.

"Prisons are not intended, nor should they be permitted, to serve the purpose of providing inmates with information about methods of securing release therefrom. . . . [I]f [a prisoner] does set forth allegations, which he does not know how to frame in terms of constitutional deprivations, this court will frame them for him. That arrangement is far superior to the 'fishing expedition' system that many inmates would prefer." 256 F.Supp. at 433.

Similarly, in DeWitt v. Pail, supra, at p. 686, this Court said:

"On the other hand, prison regulations, customs and usages limiting the times and places in which inmates may engage in legal research and preparation of legal papers, and forbidding or restricting the assistance one inmate may render to another on legal matters, involve no violation of civil rights, provided the purpose or effect thereof, or the means adopted in enforcing them, is not unreasonably to hamper inmates in gaining access to the courts. See Hatfield v. Bailleaux, 9 Cir.,

290 F.2d 632, 638, 640."

The above cases also represent the view of the California courts. In re Allison, 66 Cal.2d 282, 57 Cal.Rptr. 593, 425 P.2d 193 (1967); In re Schoengarth, 66 Cal.2d 295, 57 Cal.Rptr. 600 425 P.2d 200 (1967). Under the present case law, therefore, it is clear that the District Court properly refused permission to appellant to file the complaint in forma pauperis. As a matter of law the complaint did not state a cause of action cognizable under the civil rights statutes, and certainly no constitutional violation was involved insofar as a right to own personal copies of the particular books requested, was concerned.

Finally, it may be noted that in his brief (see e.g., AOB p. 4), appellant has made some allegations which he made in other proceedings,^{4/} but which were not alleged in the complaint below, and are therefore not properly raised here.

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4. See John Van Geldern, et al. v. Thomas C. Lynch, et al., in Case Nos. 45878, 46297, 46298 and 46299 in the United States District Court, Northern District of California, and Gilmore, et al. v. Lynch, Case No. 22052, pending in this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the District Court's order should be affirmed.

Dated: April 15, 1968

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of the State of California

DERALD E. GRANBERG
Deputy Attorney General

Louise H Renne
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Deputy Attorney General

Attorneys for Appellees

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: April 15, 1968

San Francisco, California

Louise H Renne

LOUISE H. RENNE

Deputy Attorney General
of the State of California

E X H I B I T S

FILED

JAN 14 1966

JAMES P. WELSH, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

RICHARD LOUIS BOWDEN and
ALBERT GREENVILLE BEATTIE,

Plaintiffs,

vs.

LAWRENCE E. WILSON, Warden and
JAMES W. L. PARK, Associate Warden,
San Quentin Prison,

Respondents.

Misc.
NO. 1288

ORDER

Petitioners seek permission to file a civil rights complaint in forma pauperis alleging that prison regulations prevent them and others similarly situated from purchasing law books of their choice which are to be used to prepare legal documents.

It is argued that since the prison law library is inadequate and usually overcrowded, it would be in the best interest of the state to allow inmates to purchase their own books.

*Copies to
A.G. & Phil in
1-13-66
-TC*

EXHIBIT A

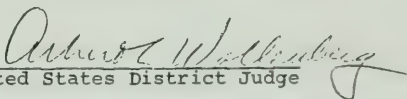
It may be conceded that due process requires that inmates have access to the courts to present their grievances, but it does not logically follow that this in effect means that each inmate should be allowed to maintain a personal law library should he so desire.

Moreover, the attachments presented with the complaint indicate that petitioners have been given permission to purchase certain legal publications to aid them with their research and that the facilities of the prison library are open and available.

This court does not feel that Constitution requires more. There is no basis for argument that an inmate is entitled to maintain as extensive a personal law library as he wishes.

Accordingly, permission to file this complaint in forma pauperis is DENIED.

Dated: January 7th 1966


United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT GRANVILLE BEATTIE,)
 Petitioner,)
 vs.) MISC. 2653
LAWRENCE E. WILSON, Warden, and)
JAMES W. L. PARK, Associate Warden,)
San Quentin Prison,)
 Respondent.)
)
)

ORDER

Petitioner, a California state prisoner, seeks leave to appeal in forma pauperis from an order of the district court denying leave to file a civil rights action seeking to obtain an order authorizing the unrestricted purchase of law books.

The motion is denied as legally frivolous for the reasons expressed by Judge Vollenberg in the order denying leave to file the complaint.

/s/ Richard H. Chambers

/s/ Homer T. Bone

United States Circuit Judges

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDGAR M. ELLIS,

Appellant,

vs.

C. J. FITZHARRIS, Superintendent,
Correctional Training Facility,
Soledad, California, et al.,

Appellees.

No. 22430 ✓
22430-A

APPELLEES' BRIEF

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FILED

MAY 1968

JAMES A. AIELLO

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDGAR M. ELLIS,

Appellant,

vs.

C. J. FITZHARRIS, Superintendent,
Correctional Training Facility,
Soledad, California, et al.,

Appellees.

No. 22430
22430-A

APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was invoked under Title 28 United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

Appellant has appealed from an order of the United States District Court for the Northern District of California, denying his petition for a writ of habeas corpus.

A. Proceedings in the State Courts.

On December 20, 1946, appellant and one John C. Defer were convicted of murder in the first degree.

Appellant was also adjudged to have suffered two prior convictions. Appellant was sentenced to imprisonment in the state prison for the term of his natural life (TR 35).^{1/} There was no appeal from the judgment of conviction, but, appellant did take an appeal from the order of the trial court which refused to correct the record relating to the recordation of the jury verdicts (TR 21). Thereafter, appellant filed petitions for habeas corpus in the Monterey County Superior Court on April 2, 1964, the District Court of Appeal for the State of California, First Appellate District on December 22, 1964, and in the California Supreme Court on or about February 17, 1965 (TR 4). The petitions were all denied (TR 4; AOB 1-2).

B. Proceedings in the Federal Courts.

On or about February 12, 1964, application was made to the United States District Court, Northern District of California for leave to file a petition for writ of habeas corpus. This application was denied on the ground that petitioner had not exhausted his state remedies (TR 3-4; AOB 1-2). A subsequent petition was filed on April 20, 1965 (TR 1; AOB 2).

On June 30, 1965, the Honorable William T. Sweigert, Judge of the United States District Court, issued an order to show cause and the Attorney General's Office, representing respondent herein filed a return to

1. "TR" refers to the transcript of record of the proceedings in the District Court.

said order on September 17, 1965. Petitioner filed his traverse on October 6, 1965 (TR 17, 20-36, 39-44).

On January 12, 1966, an interim order was filed inviting petitioner to file a supplemental memorandum addressed to the issue of voluntariness which was raised in his petition (TR 46-50). Petitioner filed said supplemental memorandum on March 31, 1966 (TR 53-59).

On August 3, 1966, Judge Sweigert denied the petition, discharged the order to show cause, and dismissed the proceedings (TR 61-72). Notice of appeal was filed on August 29, 1966 (TR 73, 74), and a certificate of probable cause was granted on September 1, 1966 (TR 77).

Thereafter by an opinion filed on April 19, 1967, the United States Court of Appeals for the Ninth Circuit reversed the decision of the United States District Court on the grounds that Townsend v. Sain, 372 U.S. 293 (1963) had expressly repudiated portions of the case of Culombe v. Connecticut, 367 U.S. 568 (1961) upon which the District Court had predicated its opinion. The case was remanded and the court instructed to construe the evidence in light of the Townsend case (TR 81-82, 83).

The cause was once again taken under submission by Judge Sweigert and by an order filed November 9, 1967, the petition was once again denied, the order to show cause discharged and the proceedings dismissed (TR 85-97). Notice of appeal was filed on November 16, 1967 (TR 101), and a certificate of probable cause was issued on November 16, 1967 (TR 99).

APPELLANT'S CONTENTION

The District Court erred in its application of the rules of Townsend v. Sain, 372 U.S. 293 (1963).

a. The trial judge did not apply the correct procedure to comply with the minimum standards of constitutionality of the proffered evidence.

b. There is no basis for an implied finding of constitutionality.

SUMMARY OF APPELLEES' ARGUMENT

The record supports the District Court's finding, made pursuant to Townsend v. Sain, 372 U.S. 293 (1963), that the trial judge had complied with the correct procedures in determining the minimum standards of constitutionality in relation to appellant's confession and that the confession was properly allowed into evidence.

ARGUMENT

Appellant's contentions on appeal consist, we submit, of a re-argument of the facts contained in the transcript of the state trial (AOB 5-9). Thus, he acknowledges that the record does support the District Court's finding that the trial court realized its duty to first determine the voluntariness of appellant's confession, but insists that elsewhere in the record, there is evidence to the contrary (AOB 6). He then states that this conflict can only be reconciled by an evidentiary hearing (AOB 7).

In reply, we would make the following observations: The District Court's prior opinion was reversed,

not because of the District Court's conclusions, but because the District Court had applied an improper standard in reviewing the evidence upon which the conclusions were based (TR 81-82). The order of this Court was that the case be remanded for consideration in accordance with the procedures detailed in Townsend v. Sain, 372 U.S. 293 (1963) (TR 81). The District Court took the case again under submission, and, in a detailed opinion, made its findings and conclusions based solely upon the standards enunciated in Townsend (TR 85-97).

Before detailing that opinion and its manifest correctness, we note a few points of law which give that discussion meaning: The District Court properly based its decision upon the state trial records (after determining that they satisfied Townsend v. Sain - see discussion, infra). That is to say, these records are evidence upon which findings and a decision may be based. Williams v. Beto, 386 F.2d 16, 19 (5th Cir. 1967); Morris v. Boles, 386 F.2d 395, 397 (4th Cir. 1967) fn. 1; Jackson v. People of California, 336 F.2d 521, 522 (9th Cir. 1964).

Where these findings are supported by substantial evidence - that is, by the state records - they are binding upon the Court of Appeals. Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965), cert. denied, 382 U.S. 866; Barber v. Gladden, 327 F.2d 101 (9th Cir. 1964); Robinson v. Johnston, 118 F.2d 998 (9th Cir. 1941), cert. denied, 314 U.S. 675.

Quare, however, as to the standard on appeal to be applied to review the District Court's finding, per Townsend v. Sain, that petitioner received a full and fair hearing in the state court (in this case at his original trial), that all the material facts were developed there and that the record fully supports the state court's factual determination of petitioner's contentions?

We submit that there is no compelling reason nor any case law which would indicate a standard differing from that usually applied to reviewing a district court's finding of fact - for that is precisely what a district court does when it applies Townsend, it makes findings of fact, Morris v. Boles, supra at 397. Therefore, we proceed with our discussion upon the basis that the record substantiates the District Court's finding that the requirements of Townsend were met, and further, that the record supports the court's finding that the confession was voluntary.

Townsend v. Sain, supra, 372 U.S. at 313 holds that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances:

"If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and

fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

The District Court herein, as reflected by its order, recognized its obligations under Townsend, and further it utilized solely those standards for its interpretation of the evidence and the assumptions which were thereafter made (TR 87-89). The evidence upon which these standards and assumptions were applied was, of course, the reporter's trial transcript of petitioner's trial (TR 88).

With reference to the first question of Townsend, that is, were the merits of the now tendered factual dispute resolved in the state hearing, the District Court found that, pursuant to the then prevailing California rule (People v. Fox, 25 Cal.2d 330, 340; 153 P.2d 729 (1944)) the trial court did make an independent determination of the voluntariness of petitioner's confession before allowing it to go to the jury for their similar determination (TR 88). The District Court proceeded then to outline that testimony in the record which showed the voir dire conducted by the court on the question of the voluntariness of the confession which

culminated in the overruling of the defense objection thereto (TR 89).

The District Court then indulged itself in the permissible assumption (Townsend v. Sain, supra, at 314) that the constitutional objection (voluntariness) was rejected on the merits (TR 90). Furthermore, the District Court also permissibly assumed (Townsend v. Sain, supra, at 315) that the state trier of fact applied correct standards of federal law and found the facts against the petitioner (TR 90). Finally, the District Court found in the transcript sufficient indicia which persuaded the court that if the state trial court had believed the petitioner's testimony, he would not have allowed the confession admitted into evidence (TR 91; Townsend v. Sain, supra, 372 U.S. 315).

Appellant points to what he deems to be evidence indicating the trial court did not believe it had the duty to make the initial determinations re voluntariness (AOB 6), he attacks the source of the indicia from which the District Court gleaned the trial court's standards and findings, and he states that one of these indicia, an instruction, did not correctly state the law concerning confessions in California at that time (AOB 7-8).

The response to the foregoing is (1) the District Court had before it all the testimony, (i.e., the entire transcript) and from the conflicting portions of the testimony, made a finding of fact. As stated, supra, this finding is binding upon the Court of Appeal.

Root v. Cunningham, supra; Barber v. Gladden, supra; Robinson v. Johnston, supra. (2) There is no requirement in Townsend that the indicia of the adequacy of a state hearing must come from any particular source. The fact that the District Court looked to the instructions given by the trial court to reconstruct the attitude and standards used by that court seems singularly appropriate and enlightening. (3) Contrary to appellant's assertion, the instruction given by the trial court was absolutely correct. People v. Fox, supra, 25 Cal.2d 339-340. The case cited by appellant (AOB 7) does not even concern itself with involuntary confessions.

The District Court's finding that the second requirement of Townsend was fulfilled is likewise supported by the record. In this regard, the District Court, pursuant to the mandate of Townsend, conducted a careful scrutiny of the state court record (TR 92-93). The District Court referred to and adopted its discussion contained in the previous order (TR 69-72, 92) wherein the court had reviewed the facts of this case according to the precepts contained in the federal cases on coerced confessions and found that in the penetrating illumination thereof the instant confession was voluntary. This discussion disposes of appellant's contention that the instant confession was involuntary because of the elements allegedly showing coercion present in the factual situation of the instant case (AOB 8). Again,

since this finding of fact is supported by the record, it must stand on this appeal.

Appellant does not attack the District Court's findings as to the remaining elements prescribed in the Townsend opinion, and for that reason, we proceed no further in our detailed analysis of the order of the District Court. We would, however, note that this order represents one of the most incisive and exhaustive applications of the rules contained in Townsend that we have encountered to date. The opinion (and this case) represents the classic example of the Townsend rules perfectly applied. We submit that it is entirely free from error.

A short conclusion would seem in order at this juncture. However, we would like to make one short comment lest our silence be deemed a waiver of the point. The "point" is 28 United States Code section 2254(d). It is our opinion that 28 United States Code section 2254(d) was enacted as the result of the Townsend case and was intended to supplant that case with regard to the respect federal courts should give to state evidentiary proceedings. The statute went into effect on November 2, 1966, United States ex rel. Maselli v. Reincke, 383 F.2d 129, 131 (2d Cir. 1967), and we believe it is the standard which the lower court should have been able to use in this case.

However, the lower court could not do so, because the order of this Court dated April 19, 1967, (TR

81-82) specifically required the District Court to interpret the state transcripts under the Townsend rules. Our petition for rehearing was denied by an order filed May 23, 1967, wherein this Court stated:

"The judgment must therefore be reversed and the cause remanded to the district court for reconsideration in accordance with procedures detailed in Townsend at pages 313-17 of 372 U.S., (and in 28 U.S. Code § 2254 as amended November 2, 1966, by Public Law 89-711, § 2, 80 Statutes 1105), beginning with a determination of whether the state court impliedly found the material facts from the conflicting evidence, and, if so, whether a reconstruction of those findings is possible."

However, this order does not appear in the official transcript, nor does the opinion of the District Court discuss the section. We submit that the burden of the District Court would have been appreciably lightened had it been able to treat this case under the requirements of 28 United States Code section 2254(d) and further such use of the section would be in obvious furtherance of the Legislative intent to attach a modicum of res judicata to state court proceedings.

/

/

/

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the opinion of the District Court should be affirmed.

DATED: May 1, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General


JAMES A. AIELLO
Deputy Attorney General

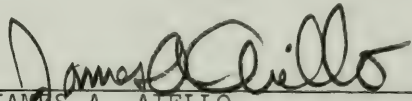
Attorneys for Appellees

JAA:cmw
CR SF
65-678

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: May 1, 1968



JAMES A. AIELLO
Deputy Attorney General
of the State of California

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 24 1969

CHARLES JOHN BARKHORN, JR.)

Appellant)

vs.)

ADLIB ASSOCIATES, INC., a)
Nevada corporation)

Appellee)

APPEAL FROM THE UNITED

STATES DISTRICT COURT FOR

THE DISTRICT OF HAWAII

BRIEF ON BEHALF OF APPELLEE

ADLIB ASSOCIATES, INC.

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FILED

JAN 13 1969

WM. B. LUCK, CLERK

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Certificate of Counsel

Certificate of Service

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES JOHN BARKHORN, JR.)

Appellant)

vs.)

ADLIB ASSOCIATES, INC., a)
Nevada corporation)

Appellee)

APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE DISTRICT OF HAWAII

BRIEF ON BEHALF OF APPELLEE

ADLIB ASSOCIATES, INC.

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was based upon Title 28 United States Code, Section 1332. The jurisdiction of this Court is found upon Title 28 United States Code, Sections 1291 and 1294.

In the Pretrial Order the following facts among others were admitted:

1. Plaintiff was a citizen of Hawaii;
2. The amount in controversy between the parties exceeds \$10,000.00;
3. Defendant was a Nevada corporation.

Appellee's Motion to Dismiss Complaint (Record 16-18) for lack of diversity because its principal place of business was Hawaii (Record 16-26) was withdrawn and Appellee ordered to file a responsive pleading.

(Record 48-49).

Judgment for Appellee was entered November 11, 1963 (Record 206-207) and amended January 7, 1964 (Record 225). Notice of Appeal from the judgment as amended was filed January 10, 1964 (Record 226-227). This Court remanded for a determination of the issue of diversity jurisdiction (345 Fed.2d 173 (1965).) The parties stipulated that the complaint shall be deemed amended as to the first sentence of paragraph 1 thereof (Record 2) to read as follows:

"Plaintiff is a citizen of the State of Hawaii; the defendant is a corporation organized and existing under laws of the State of Nevada, and on the filing date of this complaint was and is a citizen of the State of California by reason of the fact that its principal place of business on that date was and is at Santa Barbara, State of California."

The Trial Court found it had jurisdiction to enter its original decision on September 30, 1961 and reiterated and reaffirmed said original decision and entered judgment for Appellee on October 17, 1967 (Record 256-7) that Adlib on and after the filing date of the complaint herein had its principal office in Santa Barbara, California, and that it was a citizen of the State of California (Record 254).

Notice of Appeal from the judgment was filed October 23, 1967 (Record 258-259).

STATEMENT OF THE CASE

As important to making a complete State of the Case, Appellee supplements the Statement made in Appellant's Opening Brief (pp. 2-6) with the following:

The Facts as to Mr. Barkhorn's Knowledge that Surf Associates, Inc. Held a Lease at the Time the Option Was Signed on March 8, 1960, and that Appellee Was in a Position to Cause the Surf Lease to be Canceled at Any Time.

The Trial Court found:

"Prior to the signing of the option agreement, plaintiff was informed orally that the lease to Surf Associates, Inc. was in existence but that defendant had the ability to cancel it at any time because Surf Associates, Inc. was in default in payment of rent thereunder and Elizabeth M. Smyth was the sole stockholder of both of said corporations, Theodore H. Smyth was the President and Elizabeth M. Smyth was the Vice-President of both of said corporations and they and their attorneys constituted the board of directors of both of said corporations." (Record LL. 2-12, p.201)

"At all times material to this action, Elizabeth M. Smyth was the owner of all the stock of both corporations mentioned --namely, Adlib Associates, Inc., and Surf Associates, Inc. --, her husband, Theodore H. Smyth, was President, and she was Vice President of both of said corporations, and the directors of both corporations consisted of Mr. and Mrs. Smyth and their attorneys. The lease from defendant to Surf Associates, Inc., which was executed on July 1, 1959, and was still in effect on May 9, 1960, provided that defendant could cancel it if any rent thereunder was unpaid in excess of twenty days after it became due. The lease required Surf Associates, Inc. to pay rent thereunder to defendant quarterly in advance on the first day of January, April, July and October in each year during the continuance of the lease. At the time the option agreement was entered into, no rent had been paid under that lease and no rent thereunder was paid thereafter." (Record LL. 17-32, p.200, L. 1, p.201)

The Claim by the Architect

The Trial Court found:

"On or after January 20, 1961, the architects herein-above mentioned filed a Notice of Mechanic's and Material-men's Lien against the land belonging to defendant for the fee hereinabove mentioned. This, of course, was long after the option had expired. Subsequently, defendant herein and others filed an action in the Circuit Court of the First Circuit of the State of Hawaii, against said architects. Seeking an order to vacate and cancel said Notice of Lien on the ground that the circumstances on which the fee was claimed did not come within Hawaii Statutes permitting Mechanic's Liens. (Our emphasis)

"On April 10, 1963, that Court granted a motion by plaintiffs in that action for summary judgment and rendered judgment vacating and canceling of record said Notice of Lien on the ground alleged in the complaint therein. Said ruling of said Court is binding on the parties and this Court. Since plaintiff never exercised the option and therefore never put the defendant to the test of clearing up possible deficiencies in title, the question is really academic. Plaintiff never gave defendant an opportunity to clear up any question of title although aware of the possible claim sometime before the expiration of the option."

Dec. p.5, LL. 19-29, p.6, LL. 1-12, Record 203-204

The Fact that Mr. Barkhorn's Colony House Development Sales Were Not Sufficient During the Closing Days of the Option to Raise Funds Sufficient to Proceed Under the Option.

On the last day of the option period (extended from Sunday to Monday) May 9, 1960, Plaintiff gave Defendant a letter saying Plaintiff elected to cancel the project and demanded return of the \$50,000.00 paid for the option because of the existing lease and the possibility of a suit by the architect. (Admitted Facts 8, Record 136, Ex. 1)

Appellant Barkhorn did not have the required \$1,900,000 loan commitment or the requisite unit sales of \$2,300,000 required before commencement of construction advertised for July 1, 1960. Under the unit

sales made, only \$342,820 was due under the contracts at the time construction was scheduled to commence. (Ex. B - Chart)

By April 26, 1960, sales had stopped and no sales were made during the last twelve days of the option period. (Admitted Facts 17, Record 139, Ex. A - Chart)

The Trial Court found:

"The Court is convinced from all the evidence including the testimony of plaintiff himself and other evidence and testimony stipulated to, although some facts testified to by other witnesses are not remembered or not admitted by plaintiff to be true, that plaintiff was fully aware of the situation, including the outstanding lease to Surf Associates, Inc., before the signing of the option, and found no fault with it until, faced with the prospect of losing his option from sheer inability to arrange for the necessary funds or credits within the option period, he suddenly without previous demand or warning to defendant, attempted to rescind as a last ditch expedient to try to retrieve his \$50,000." (Dec. p. 5, LL. 16-18, Record 203)

SUMMARY OF ARGUMENT

A. The giving of an option for a lease neither implies nor "promises" covenants of title.

Appellant not only asserts that an option implies or "promises" covenants of title but that the option both implies and promises covenants of title retroactively as of the date of the option — regardless of date of exercise, if the option agreement, by its terms, provides that the lease shall commence "from and after and retroactively as of the date of the option." For these two contentions, Appellant fails to cite authority.

B. The optionor may contract to sell property he does not own. The only obligation of the optionor is to be able to convey clear title at the time the optionor is obligated to convey title. JOYCE v. SHAFER, *infra*.

C. Appellant fails to cite authority holding that an option for a lease, dated March 8, 1960, providing that if the option be exercised, the lease would, "be from and after and retroactive to March 8, 1960" obligates the optionor to make a conveyance and give covenants of title as of the date of the option.

D. The option provided that optionor may retain the \$50,000 deposit if the option was not exercised. If the option was exercised, Appellee became obligated to draft and convey a 55-year lease to the optionee, which necessarily allowed Appellee a reasonable time in which to perform.

E. An optionee cannot rescind and recover the option deposit without first exercising the option when the optionor had a reasonable time in which to perform and there is no reason to believe the optionor will not be able to perform. SEEBURG v. EL ROYALE CORP., infra.

F. The instant situation was within the rule upheld by SEEBURG v. EL ROYALE CORP., infra, because there was no reason to believe Appellee could not perform and Appellee had a reasonable time in which to perform.

G. An optionee may rescind and recover the option deposit without exercising the option when it is obvious that the optionor cannot convey valid title and does not have a reasonable time in which to perform. BURKS v. DAVIES, infra.

H. The instant situation was not within the rule of Burks v. Davies because Appellee was entitled to a reasonable time in which to perform and there was no reason to believe Appellee could not perform.

I. Appellant demanded rescission on the last day of the option referring to the Surf lease of which he was aware before the option was signed and because of an architect's claim which was academic under the

issues involved.

J. Appellant never exercised the option. By the time Appellant had given notice of rescission and demanded return of the option money, (May 9, 1960), his sales had fallen off and he was not in a financial position to exercise the option. (Admitted Fact 17, Record 136-9)

POINT I

AN OPTION TO LEASE LAND DOES NOT IMPLY OR "PROMISE" COVENANTS OF TITLE AS FOUND IN LEASES.

PLAINTIFF FAILS TO CITE AUTHORITIES IN SUPPORT OF HIS POINT I THAT, "THE OPTION AGREEMENT 'PROMISES' THAT APPELLEE CAN GIVE A GOOD TITLE ON MARCH 8, 1960".

APPELLANT IN SUPPORT OF HIS CONTENTIONS MERELY DISCUSSES CASES HOLDING THAT LEASES IMPLY COVENANTS OF TITLE:- A PROPOSITION APPELLEE DOES NOT CHALLENGE.

=====

The Trial Court concluded and cited these authorities:

"A person may contract to sell land which he does not own. There is no implied covenant that he has a clear, or any, title at the time the contract is entered into, his only obligation is to be able to convey a clear tile at the time agreed upon for a conveyance."

JOYCE v. SHAFER (1893) 97 Cal. 335, 32 Pac. 320

See also: LUETTE v. BANK of ITALY, N.T. & S.A.
(1930) 9th Cir., 42 Fed.2d 10

(Dec. p. 3, 21-26, Record 201, LL. 21-26

Notwithstanding the Trial Court found there was no implied covenant or warranty of title during existence of the option agreement (Dec. p. 3, Record 201-202), Appellant, seeking to avoid the effect of the Trial Court

conclusion (and the law), attempts something novel by asserting as his Point I - "the option agreement 'promises' that Appellee can give a good covenant of title on March 8, 1960". Appellant fails to cite authority sustaining this assertion.

In the face of the foregoing conclusion by the Trial Court that as a matter of law an option does not imply covenants of title, Appellant asserts (without authority) that an option "promises" that the optionor gives a covenant of title retroactively as of the date of the option regardless of the day on which the option is exercised by optionee. Appellee submits that the foregoing conclusion and authority cited by the Trial Court completely determines that an option agreement neither implies nor "promises" the giving of a covenant of title retroactively as of the date of the option or at all.

Appellant makes no attempt to challenge the conclusions made by the Trial Court in its Decision that the only obligation of the optionor is to be able to convey clear title at the time agreed upon for the conveyance. (Record 201, LL. 24-25) and Joyce v. Shafer, supra; Lurette v. Bank of Italy, N.T. & S.A., supra, Dec. Footnote, Record 201).

Appellant cites McAlester v. Landers (1886) 70 Cal. 79, 11 Pac. 505, holding that the lessor broke his covenant of title as soon as he made it because part of the property had been previously leased to another. This holding is not challenged by Appellee. This case did not involve an option to give a lease but did involve a lease although the lessor had previously leased part of the premises to another. Of course at the time the second lease was conveyed there was an implied covenant of title which was broken because another lease had been previously given. McAlester v. Landers, supra, does not sustain Appellant's Point I that an "option agreement promises that the optionor can give a good covenant of title

retroactive to the date of the option agreement".

Appellee points out that making and delivery of a lease agreement does contain implied covenants among others, of title and quiet enjoyment. An option, not a lease, however, was before the Court. Appellant never exercised his option to take a lease.

On page 5, Appellant cites authorities holding that a lease agreement contains implied covenants of title and for quiet enjoyment. These are not challenged by Appellee. The question before the the Court, is the validity of Appellant's Proposition I that an option to lease contains covenants of title and quiet enjoyment. There is no need to consider Appellant's authorities cited by Appellant:- Le Hoy v. Kapoilani Estate, 26 Haw. 489 (1922); Rowle, Covenants of Title, 5th Ed., §253, p.439; 1 Tiffany, Landlord & Tenant, §239; or 51 C.J.S., Landlord & Tenant, §239, from which a quote is set forth on page 5.

The covenants of title are made at the time of the conveyance - at the time of the giving of the lease. A lease was not drafted or given herein because the option was not exercised by Appellant.

Appellant contends that because the option (Ex. 4, p.2) provided the lease term of 55 years, "shall be from and after and retroactive to March 8, 1960", that the lease therefor was to contain the usual covenants of title effective however as though made on March 8, 1960, regardless of the date on which the option was exercised. Appellant here misconceives commencement of the lease term relating back to the date of the option agreement as though in fact the conveyance was actually being made also on the date of the option for the lease and not on the later date during the option period on which the option was exercised. Appellant confuses the covenant implied in the lease as of the time of making the conveyance

therefor as going back retroactively to the date of the beginning of the lease term overlooking that the covenant of title is actually made or implied only when the conveyance of the lease is made and not prior thereto. Appellant overlooks that the 55-year lease called for, if the option was exercised, called for a reasonable time in which to draft the lease which would delay actual making of a covenant of title until some days after exercise of the option and when the 55-year lease had been drafted and the conveyance thereof actually made.

Provisions for relating the commencement date of lease back to dates fixed are not uncommon:

"...the option vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to call for specific performance. Such right, when exercised must necessarily relate back to the time of giving the option so as to cut off intervening rights acquired with knowledge of existence of the option."

SMITH v. BAGHAN (1909) 156 Cal. 359, 365, 104 P. 689

"Such right (option) when exercised, must necessarily relate back to the time of giving the option (Peoples St. Ry. Co. v. Spencer, 156 Pa. St. 85, 27 Atl. 113) so far as to cut off intervening rights acquired with knowledge of existence of the option."

SEEBURG v. EL ROYALE CORP. 54 CA 1-4

POINT II

WHEN THE OPTION IS NOT EXERCISED AN OPTIONOR WITHOUT TITLE CANNOT BE DEFAULTED AND REQUIRED TO RETURN THE OPTION MONEY WHEN THERE IS NO REASON TO BELIEVE OPTIONOR WILL BE UNABLE TO MAKE A VALID CONVEYANCE AND OPTIONOR HAS A REASONABLE TIME IN WHICH TO PERFORM.
(SEEBURG v. EL ROYALE CORP., *infra*)

WITHOUT OPTIONEE FIRST EXERCISING THE OPTION AN OPTIONOR WITHOUT TITLE CAN BE DEFAULTED AND REQUIRED TO RE-

TURN THE OPTION MONEY WHEN IT IS IMPOSSIBLE FOR
OPTIONOR TO CONVEY TITLE WITHIN THE OPTION PERIOD.
(BURKS v. DAVIES, infra)

BECAUSE THERE WAS NO REASON TO BELIEVE APPELLEE COULD
NOT PERFORM IN THE REASONABLE TIME AVAILABLE (SEE-
BURG v. EL ROYALE CORP, infra), APPELLANT'S CONTENTION
THAT APPELLEE WAS IN DEFAULT ALTHOUGH APPELLANT
HAD NOT EXERCISED HIS OPTION IS PLAINLY ERRONEOUS.

In Seeburg v. El Royale Corp., defendant vendor gave plaintiff-optionee a 30-day option to buy an apartment house for which the optionee paid \$5,000. To exercise the option, optionee was required to give written notice and deposit \$25,000 in escrow. Each party had 30 days, after notice, to perform their respective obligations. During the option, optionor was made subject to a restraining order from selling the property which was effective for the remaining period and later. Optionee demanded return of the \$5,000 and brought a rescission action to recover. The court held that an optionee, who has not tendered performance as required to exercise the option, cannot demand return of option money because the optionor was temporarily stopped by an injunction and the optionor had 30 days in which to perform after notice and there was nothing to show that if optionee had exercised the option, the optionor could not have performed.

In Burks v. Davies, optionor gave plaintiff-optionee an option on August 8 to September 1 to purchase an undivided one-third of certain lands and accepted \$1,000 for the option. Optionor knew there were five acres he did not own but did not inform optionee of this fact. Prior to expiration of the option, optionee learned optionor did not have title to

5 acres and rescinded the option demanding repayment of the \$5,000.

Optionor made no effort to secure title until he received notice of rescission. Optionor was given an extra 24 hours after notice and did not obtain title but obtained an option subject to another option. The court held that without making a tender or exercising the option the optionee was entitled to rescind and obtain return of his deposit money when optionor does not have title and cannot obtain title within the option period.

On page 14 of his Brief, Appellant recognizes the two rules:- the rule denying recovery of option money without exercise of the option where there is no reason to believe optionor could not perform, as held in Seeburg v. El Royale Corp., 54 CA2d 1, 128 P.2d 362 (1942), in which optionor had 30 days after notice to comply with the option; and the rule followed in Burks v. Davies, 85 Cal. 110, 24 Pac. 613 (1890), in which performance by optionor was impossible and wherein recovery of option money was allowed without Optionee being first required to exercise the option.

Appellant says the Burks case may be distinguished from the Seeburg case because in the Seeburg case, the optionor was allowed 30 days to perform (App.Br. p. 14). This was not the only fact distinguishing the Seeburg case from the Burks case. In the Seeburg case, there was no reason to believe the optionor could not convey title; in the Burks case, there was no reason to believe the optionor could convey title; performance was impossible.

It is not correct, as Appellant says in the last paragraph on page 15 of his Brief, that in the Burks case, the optionor obtained on the last day an offer of sale from the true owner of 5 acres to correct the deficiency.

In the Burks case, rescission and restitution of option money was allowed without exercise of the option because performance by optionor

was impossible. Optionor did not have and could not acquire title to a 5-acre parcel. On the last day of the option extended 24 hours, optionor was able to acquire only an option to buy the 5-acre parcel and that option was subject to a prior option. (Opin. pars. 4, 9, 10)

"...defendant never did succeed in getting title to the property held by Smith, and could not have conveyed it before expiration of the time given for exercise of the option." Opin. par. 9

The Burks case held that although optionor need not hold title at all times during the option period, the optionor must have title at the time the optionor becomes obligated to convey. Opin. par. 6

The Burks case held: that the optionee may rescind and have restitution of the option money paid for the option upon learning that there is no possibility that optionor can perform; and that in the situation in which performance is not possible, equity does not require the idle act of notice or exercise of the option which cannot be performed.

The Burks case did not hold: that for an option to be valid, optionor must hold title to the land optioned; that the optionor can be placed in default without exercise of the option - in the absence of the usual grounds of fraud, failure of title etc., giving right to rescission of the option contract; or that the optionor must hold title at all times during the option period; that in all instances, the optionor is not entitled to a reasonable time in which to perform; and that the power to obtain and convey title at the time performance becomes due is not sufficient against a demand for rescission. Opin. par. 6.

Upon exercise of the option, this performance was required by Adlib:- to cancel the Surf lease; and prepare, execute, sign and deliver (with possession) the lease, dated retroactively as of March 8, 1960 - the option date.

In the absence of being excused from exercising the option in those situations in which performance by the optionor is impossible (Burks v. Davies) the optionor cannot be placed in default without exercise of the option because it is only upon exercise of the option that optionor becomes obligated to make a conveyance and it is only when time for performance arrives, can it be determined that optionor can or cannot perform in the absence of a situation in which performance is obviously impossible. (Burks v. Davies, supra)

The Trial Court found that the instant situation was not within Burks v. Davies, supra, and was within Seeburg v. El Royale Corp., supra; and that the only obligation of Appellee Adlib was - "to convey title at the time agreed upon for a conveyance", citing Joyce v. Shafer (1893) 97 Cal. 335, 32 Pac. 320; Lurette v. Bank of Italy (1930) 9th Cir., 42 F.2d 10; (Dec. p. 3, Record 201) and that there was no evidence of inability of Appellee to convey clear title at any time within the option period. (Dec. p. 4, LL. 14-17, Rec. 202)

Burks v. Davies does not apply to the instant facts because - as found by the Trial Court - Adlib could give a lease with a clear title at any time during the option. (Dec. Record 201) Exercise of the option by Barkhorn was therefore not excused.

"It necessarily follows that, unless plaintiff exercised the option and defendant was unable at that time to execute a valid and clear lease, defendant would not be in default under the option agreement. As has been pointed out, plaintiff did not exercise the option."

Dec. p. 3, LL. 27-32, Record 201.

Appellant seeks to escape the rule in Joyce v. Shafer, supra, quoted above and on page 12 of Appellant's Brief by alleging "there was a clearly expressed covenant that Appellee could give a lease beginning the very day the option was executed" (App. Br. p. 13). Appellant then goes on to say

"The reason for this distinction is succinctly stated at 55 Am. Jur., Vendor & Purchaser, 344". What the "distinction" is Appellant fails to define.

It is obvious that the quote from American Jurisprudence does not sustain Appellant's assertion that Appellee expressed a covenant that Appellee could give a lease retroactively beginning in fact on the date of the option.

The quote from American Jurisprudence on page 13 of Appellant's Brief is taken from Burks v. Davies. An examination of the quote in American Jurisprudence shows that Burks v. Davies is the only case cited as authority therein.

The quote give by Appellant from 55 Am. Jur., Vendor & Purchaser, §44, on pages 13 and 14 of his Brief does not state the rule completely. We think Appellant should have quoted also, the next sentence taken from American Jurisprudence reading:

"Where the purchaser knew at the time the option was given that the vendor held under a bond for title only, and the option provided for the giving of a deed conveying a good title after the option had been exercised and a certain amount had been paid to convert the option into a binding contract, he cannot claim that the want of title in the vendor constituted a breach of the option without making the payments required by the option."

55 Am. Jur., Vendor & Purchaser, §44 in part
immediately following quote in App. Op. Br. p. 13.

POINT III

ADMISSION OF EVIDENCE THAT APPELLANT BARKHORN, PRIOR TO
MAKING THE OPTION, WAS INFORMED OF THE OUTSTANDING
SURF LEASE DID NOT VIOLATE THE PAROL EVIDENCE RULE.

THERE WERE NO COVENANTS OF TITLE (POINTS I and II, supra) TO VIOLATE AND THE EVIDENCE WAS NOT OFFERED TO VARY AND THE EVIDENCE ADMITTED DID NOT VARY TERMS, BUT TO SHOW THE INEQUITABLE POSITION OF APPELLANT BECAUSE HE KNEW OF THE SURF LEASE PRIOR TO TAKING THE OPTION.

=====

Again Appellant fails to offer authority supporting his contention that an option "promises" covenant of title retroactively effective as of the date of the option regardless of the date on which the option is exercised. This contention is substantially a repetition of Appellant's preceding Points I and II.

Appellant fails to point out that the evidence admitted did in fact vary any option terms.

Appellant cites authorities all to the effect that surrounding facts etc., cannot be used to contradict etc., or vary the meaning or legal effect of an instrument. (App.Br. pp. 20-21) Appellee does not challenge these authorities or the parol evidence rule as stated by Appellant. The parol evidence rule is not applicable because the evidence offered was not used or intended to be used in any way to modify the plain meaning of any provision of the option agreement.

The Trial Court found there were no covenants or warranties of title arising from the option or during the existence of the option agreement.

"Plaintiff objects to evidence as to information given him orally by persons acting in behalf of defendant, on the ground that it contradicts the claim 'implied warranty of title'. The Court has ruled that there was no 'implied warranty of title' during the existence of the option agreement. Therefore, such testimony, if material, could not be excluded by the parol evidence rule."

Dec., Record 202

The parol evidence rule cannot come into operation as to covenants which did not exist, which had not yet come into existence by exercise of the option for the lease and which would come in to existence only at the time that the lease was conveyed.

The evidence offered does not violate the parol evidence rule because it does not and was not offered to contradict, vary or modify the option agreement or any covenant of title implied therein. The parol evidence rule does not apply.

POINT IV

THE OPTION AGREEMENT DID NOT IMPLY OR "PROMISE" A COVENANT OF TITLE AS HAVING BEEN MADE RETROACTIVELY ON THE DATE OF THE OPTION - MARCH 8, 1960.

THEREFORE, APPELLANT DID NOT HOLD A COVENANT OF TITLE WHICH COULD BE VIOLATED BY THE SURF LEASE OR BY THE ARCHITECT'S CLAIM (Presuming but not conceding the claim was an encumbrance).

As his Point IV, Appellant again claims Appellee made a covenant of title as of March 8, 1960, the option date, because, "...lease would be from and after and retroactive to March 8, 1960". (App. Br. p. 32) In each of his preceding Points I, II and III Appellant has grounded his contentions upon the same assertion that Appellee made a covenant of title or promised a covenant of title as of March 8, 1960, the date of the option agreement.

Appellant's contention:- "Point IV. The Encumbrances on the Property Constitute a Breach of Covenant" cannot be sustained for the same

reason Appellant's Points I, II and III cannot be sustained:- there were no covenants of title implied or promised by the option as established by Appellee's preceding Points I, II and III.

The error by Appellant appears in the sentence reading:- "The covenant of title would be that the appellee has sufficient title to give a lease on that day" (App.Br. p. 22), referring to March 8, 1960. Again Appellant presumes erroneously that Appellant would be obligated to retroactively go back and with magic make conveyance along with covenants of title on March 8, 1960. Why this is not true has heretofore been discussed under Points I and II, supra.

The Surf lease could not have been an obstacle. The lease from Adlib Associates, Inc. to Surf Associates, Inc. was made in connection with a plan to develop the land owned by Adlib Associates, Inc. by erecting thereon a cooperative apartment building to be known as Waikiki Manor (Record 137). Surf did not pay any rent (Pretrial Order, Admitted Fact 11, Record 137). In result, the lease was in default on July 21, 1959 because rent was payable on the first day of January, April, July and October (Ex. 7, p. 34). The lease provided the lessee was in default if rent was not paid within 20 days (Ex. 7, p. 13). The Waikiki project was abandoned in December 1959. Construction of a building had not been commenced (Ex. 8-A; Pretrial Order Admitted Fact 15, Record 138). After Appellant signed the option, Appellant used the property as a base for Appellant's operations in his selling effort in connection with his proposed Colony House development of the premises.

Appellant had no legal basis for trying to use the architect's claim as justification for "rescission" because a mechanic's lien, if one had been

filed prior to execution of the lease, would not have prevented execution of the lease. The only effect of the filing of the claim would have been to require Appellee as lessor to take care of the matter.

Furthermore, the architect's claim was not made the subject of mechanic's lien until January 20, 1961; the lease to Appellant would have been prepared, executed and delivered at the latest shortly after May 9, 1960 which was the last day on which Appellant could have exercised the option. Hence, the architect's claim would have absolutely no effect on the execution of the lease to Appellant.

The evidence shows that if Appellant had exercised the option, Appellee could have performed the option and could have done so promptly. Appellee could have eliminated the lease outstanding at the same meeting of the Board of Directors at which execution of the lease to Appellant would be authorized.

The Trial Court found:

"Since plaintiff never exercised the option and therefore never put defendant to the test of clearing up possible deficiencies in title, the question is really academic. Plaintiff never gave defendant an opportunity to clear up any question of title, although aware of a possible claim sometime before the expiration date of the option."

(Dec. p. 6, LL. 6-9, Record 204)

Appellee does not deem a discussion as to Appellant's remarks about fraud as necessary other than to point out that Appellant's discussion is based on surmises resting on suppositions not within issues pled or tried and a topic raised for the first time on appeal.

POINT V

APPELLANT IS NOT IN AN EQUITABLE POSITION WHICH PERMITS
EXERCISE OF THE EQUITABLE REMEDY OF RESCISSION.

The following facts reveal reasons Appellant made a last ditch effort on May 9, 1960 to "rescind" the 60-day option agreement dated March 8, 1960 which terminated by its terms on May 8, 1960 and of which Appellant had enjoyed the full benefits for the full 60 days.

The basis building requirement was \$4,200,000; a \$1,900,000 loan commitment was required; there was no loan commitment; Appellant did not have a loan commitment; before construction could even commence \$2,300,000 in cash by down payments from sales of units to investors was needed; by the end of the option period there was cash in hand of only the sum of \$39,650 and only \$342,840 promised in the agreements obtained in result of the sales efforts made by Appellant which would have become due at the time of the advertised commencement of construction; the total value of sales was only \$1,663,150 against a required \$2,300,000.

Summarized from: Pretrial Order, Admitted
Facts 16, 17 18

Record 138, 139; For graphic illustration of
above facts see Exs. A, B and C - Charts

At the close of the option period, Appellant did not have sufficient sales or a loan commitment permitting him to proceed with the project and Appellant wanted out. Having failed of the opportunity purchased, Appellant seeks to take back the \$50,000 (Pretrial Order, Admitted Facts 16, 17, 18; Record 138, 139). Appellant was not able to exercise the option.

The Court found:

"Furthermore, if this action be considered as equitable or quasi-equitable as well as legal, the Court finds no such equities in favor of Plaintiff as would warrant a judgment permitting recovery by him in this action." (Record 204, Dec. p. 6, LL. 23-23)

"It is a general rule...in courts of equity, that if a party is free from duress...and is the winner of his right to rescind, he must do so promptly. Delay may result in a Court's denying the right to rescind."

12 Cal. Jur. 2d 412 citing

FRANKISH v. FED. MORTGAGE CO., 30 C.A.2d
700, 87 P.2d 90

SANDERS v. MAGILL, 9 Cal.2d 145, 70 P.2d 159

"The party seeking to rescind a contract must act with due diligence."

§194, 12 Cal. Jur. 2d 412.

CONCLUSIONS

The option agreement provides that Appellee shall keep the \$50,000 deposit if Appellant fails to exercise the option. Having enjoyed the benefits of the option for the full 60 days by testing the market for his cooperative apartments, Appellant on the last day - the 61st day because Sunday was the 60th, attempts to rescind and demands return of his deposit excusing himself from exercising the option by complaining of the existing Surf lease and a possible claim by an architect. Appellant knew of the Surf lease before signing the option and of the architect claim by March 28, 1960, and neither complained or did anything about them until mentioned in his notice of rescission given on May 9, 1960.

To excuse his failure to exercise the option Appellant offered the novel thesis supported by no authority that Appellee by giving the option, implied or promised a covenant of title retroactively as of March 8 the option date. This contended innovation in the law made by Appellant is the basis of each and all the four Points set forth in Appellant's Brief.

Appellant contends in his Point I that the option agreement "promises" a covenant of title on March 8; in Point II because of the aforesaid covenant on March 8 there was violation on March 8; in Point III, that because

of the covenant claimed, it was violated by parol evidence; and in his Point IV that the covenant was violated by the Surf lease and the architect's claim. Thus Appellant's new claim as to covenants is the basis of all his four Points.

The Trial Court found that an option does not imply covenants of title. (Joyce v. Shafer) Appellant fails to challenge this authority.

To excuse his failure to exercise the option Appellant cites Burks v. Davies, *supra*. The Trial Court found that there was no evidence that Appellee was not able to perform if the option had been exercised. The instant situation was within the rule of Seeburg v. El Royale Corp., *supra* and not within Burks v. Davies. Appellant failed to show a valid ground for not exercising the option.

The facts admitted and the conclusions by the Trial Court showed that Appellant was not able financially to exercise the option.

The Trial Court also found that Appellant was not in an equitable position in which to demand rescission complaining of items he knew about before the option was signed on March 8, 1960 and not having complained about them until his complaint on the extra last day in a "last-ditch" effort to get back his deposit for an option he used for his purposes but could not financially exercise.

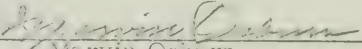
Appellee has quoted extensively from findings by the Trial Court because Appellant's Brief appears to Appellee to ignore these findings as to facts established and to re-argue the case de novo as though there was no judgment.

Appellant has not shown any errors in the Trial Court Decision.

For above reasons, Appellee submits that the judgment by the Trial Court should be affirmed.

RESPECTFULLY SUBMITTED,

January 10, 1969.



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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Marvin Osburn

CERTIFICATE OF SERVICE

I hereby certify that service of the Brief on Behalf of Appellee

Adlib Associates, Inc. in the within action was made upon:

MR. FRANK D. FADGETT
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attorney for Appellant, on January 10, 1969, by mailing three (3)
copies thereof to his office as shown above.

Dated: Los Angeles, California, January 10, 1969.

Marvin Osburn

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OSBURN & OSBURN
of counsel

NO. 22434

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 24 1969

CHARLES JOHN BARKHORN, JR.,)

Appellant,)

vs.)

ADLIB ASSOCIATES, INC.,)
a Nevada corporation,)

Appellee.)

APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE DISTRICT OF
HAWAII

FILED

FEB 3 1969

WM. B. LUCK, CLERK

REPLY BRIEF ON BEHALF OF APPELLANT
CHARLES JOHN BARKHORN, JR.

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REPLY BRIEF ON BEHALF OF APPELLANT
CHARLES JOHN BARKHORN, JR.

ARGUMENT

I. THE OPTION AGREEMENT DID CONTAIN, AND APPELLEE DID BREACH, AN IMPLIED COVENANT OF TITLE, THEREBY ENTITLING APPELLANT TO RESCIND.

Appellee admits that a covenant of title is implied in a lease (Appellee's Brief, p. 8), but repeatedly asserts that appellant has offered no precedent that a covenant of title is implied in an option to lease.

It is a conceptual quibble to say that the covenant is "in" the lease and not "in" the option to lease where the optionor, as here, cannot deliver what he

promised. If I grant you an option to buy my bull Ferdinand, may I keep the option money if Ferdinand is a steer?

It should be no surprise that appellant has not found a precedent exactly in point. Neither has appellee. The reason is that the option agreement here is most unusual. But appellee, as did the Court below, has failed to see that the very features of the option agreement which are so unusual, give rise to an implied covenant of title.

The agreement here granted an option to lease. In view of the dearth of cases dealing with options to lease, as distinguished from options to purchase, it would appear that that fact alone makes this option agreement less than usual. But what is extraordinary is that the lease was to be "for the term of fifty-five (55) years from and after and retroactive to March 8, 1960, being the date of this instrument." (Exhibit 4, p. 2) What is more, rent under the lease was to have accrued retroactively from March 8, 1960, with the \$50,000 option money to have been credited as the first six months' rent. (Exhibit 4, pp. 2-3, ¶4(b)(1))

Appellee contends that the covenant of title in the lease would have been effective only from and

after execution and delivery by appellee of the lease document. (Appellee's Brief, pp. 9-10) But the retro-activeness of the lease simply will not allow appellee such an arbitrary and convenient exception. Appellee's own express covenant of quiet enjoyment, and all of appellant's covenants, would have been effective as of March 8, 1960, as a reading of the lease form referred to and adopted in the option agreement will show. (Exhibit 4, p. 10; Exhibit 6)

Since appellee promised in the option agreement that appellant would receive a lease covenanting title effective as of March 8, 1960, appellee necessarily covenanted that on that date it had clear title to the premises to be leased. Appellee did not just offer appellant a lease of the premises; it promised him a lease of premises to which its title was clear on March 8, 1960.

But on March 8, 1960, and throughout all of the option period, Surf Associates, Inc. had a lease covering every square inch of the premises and every minute of the term which were to be exclusively appellant's under the lease he bargained for. (Exhibit 7; Record 137)

Appellant was therefore entitled to rescission of the option agreement for breach by appellee of its

implied covenant of title thereunder.

Appellee makes much, however, of the proposition that a person may contract to sell or lease land he does not own, which appellant has never questioned. But that proposition is irrelevant here. What is relevant is that there is no bar, certainly none that appellant has found, against an optionor covenanting that he has clear title to land as to which he grants an option to purchase or lease. Appellant submits that such a covenant, unusual to be sure, is implied here simply because the option here is unusual enough to require it.

II. APPELLANT EFFECTIVELY RESCINDED THE OPTION AGREEMENT AND IS ENTITLED TO RESTITUTION.

Appellee asserts that appellant, as a prerequisite to rescinding the option agreement, had to tender exercise of the option, which he did not. This assertion is inapplicable to the present facts and is bad law, in that it confuses the enforcement of an option with its rescission.

Appellee confuses rescission with actions for damages or specific performance. These remedies are inconsistent. 2 Restatement, Contracts §384. The reason is very simply expressed in 5 Williston, Contracts §683 (1961 ed.):

Thus where a contract is breached in the course of its performance, the injured party has a choice presented to him of continuing the contract or refusing to go on.

As already seen, appellee breached its implied covenant of title. If appellant had wished to continue with the option agreement, he would have had to have exercised his option during the prescribed period. He could not have required appellee to perform its obligations without performing his own. But appellant elected the other alternative, rescission of the agreement.

Appellee also attempts to fault appellant for failure to exercise his option, on the authority of Seeburg v. El Royale Corp., 54 Cal. App. 2d 1, 128 P. 2d 362 (1942). That case denied rescission without tender because the option gave the optionor thirty days after exercise in which to convey. It is consistent with the proposition that tender may be required to place an optionor in default and thereby to provide grounds for rescission.

Appellee, which assumes it was never in default, tries to squeeze itself within the Seeburg holding. It baldly states that, in the event the option was exercised, it had a reasonable time thereafter under the agreement

to clear its title. (Appellee's Brief, pp. 6, 10, 13) But nowhere in the agreement is there provision for so much time. (Exhibit 4, p. 10) Appellee, if appellant did exercise the option, would have been allowed only the time necessary for it to execute the lease; yet at no time during the option period did appellee cancel or attempt to cancel its lease to Surf Associates, Inc.

Appellee concedes that an optionee, without tendering performance, may rescind and obtain restitution if performance by his optionor is impossible. (Appellee's Brief, p. 13) This is the holding of Burks v. Davies, 85 Cal. 110, 24 P. 613 (1890).

The problem is that both the Court below and appellee have not realized that appellee could not have performed its bargain even if appellant had exercised his option.

Performance by appellee was impossible because it had promised appellant a lease covenanting title from and after March 8, 1960, when throughout the option period the same premises were leased to Surf Associates, Inc. Such a conflicting lease would have been a nullity.

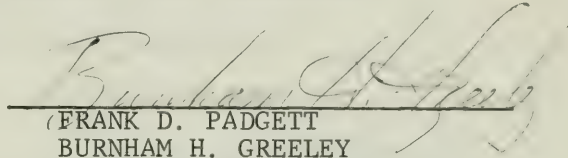
As tender would have been an empty gesture, appellant's rescission without exercise cannot bar his obtaining restitution of the \$50,000 option money.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

DATED: Honolulu, Hawaii, January 31, 1969.

Respectfully submitted,



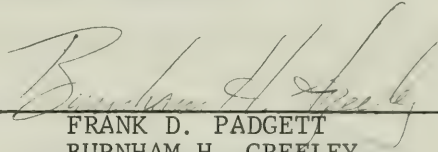
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


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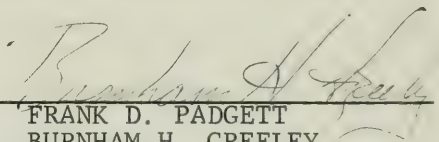
CERTIFICATE OF SERVICE

I certify that this brief was served upon
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address on January 31, 1969.

Dated: Honolulu, Hawaii, January 31, 1969.



FRANK D. PADGETT
BURNHAM H. GREELEY

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Appellee.

BRIEF ON BEHALF OF APPELLANT
CHARLES JOHN BARKHORN, JR.

FILED

APR 5 1968

WM. B. LUCK, CLERK.

Attorney for Appellant

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1963 (Record 206-207) and amended January 7, 1964 (Record 225). Notice of appeal from the judgment as amended was filed January 10, 1964 (Record 226-227). This court remanded for a determination of the issue of diversity jurisdiction (345 F. 2d 173 [1965]). The court below determined that it had jurisdiction to enter its original decision and entered judgment for appellee on October 17, 1967 (Record 256-257). Notice of appeal from the judgment was filed October 23, 1967 (Record 258-259).

STATEMENT OF THE CASE

On July 1, 1959, appellee, Adlib Associates, Inc., leased certain lands at Waikiki to Surf Associates, Inc. for 61 1/2 years (Exhibit 7). These two corporations were closely affiliated. Theodore H. Smyth was president of both, and his wife, Elizabeth M. Smyth, was vice-president and sole stockholder of both. The directors of both corporations were the Smyths and their attorneys (Record 137). The lease to Surf Associates, Inc., was part of a scheme to develop the land by building on it a cooperative apartment to be known as "Waikiki Manor" (Record 136-137).

On July 21, 1959, Surf Associates, Inc., not

having paid any rent under the lease, was in default, and appellee had the right to cancel the lease. Surf Associates, Inc., never paid any rent (Exhibit 7, Record 137).

On August 4, 1959, Surf Associates, Inc., contracted with Weed, Wallace & Associates, Inc., for plans and other architectural services for the projected building (Exhibits 8A, 8C; Record 138).

Sometime between August 4, 1959 and December 1, 1959, the Waikiki Manor project was abandoned. Construction was never begun (Exhibit 8C, Record 137).

On March 8, 1960, appellee gave appellant a sixty-day option to lease the same land for fifty-five (55) years (Exhibit 4). It is agreed that appellant knew that the abandoned Waikiki Manor project included a lease to Surf Associates, Inc., and that both corporations were controlled by the Smyths (Record 143-145). It was stipulated that appellee's witnesses would have testified that they told appellant before he signed the option that the old lease was still outstanding but could be cancelled (Record 145). Appellant's stipulated testimony contradicted them (Record 143). In any event, the option agreement made no mention of Surf Associates, Inc., or any lease but the one it promised appellant (Exhibit 4).

The option agreement recites that appellee "is the owner" of the lands described (Exhibit 4, p. 1) and offers a lease for "fifty-five (55) years from and after and retroactive to March 8, 1960, being the date of this instrument" (Exhibit 4, p. 2). It gives many details of the lease, including a minimum annual rent of \$100,000, the requirement that appellant build a 400-room, \$3,200,000 hotel and a provision that the lease "shall include generally the usual terms and conditions contained within a land lease covering business or hotel properties in Hawaii" (Exhibit 4, p. 10).

On March 28, 1960, Theodore H. Smyth informed appellant of "word just received of the threat of a law suit from our former architect over his fee" (Exhibit 1).

On or after April 26, 1960, Theodore H. Smyth sent appellant certain papers (Exhibit 5). These papers, if executed by appellant and substituted for the first and last pages of the option agreement, would have made Surf Associates, Inc., the optionor instead of appellee. Appellant did not execute them.

On May 9, 1960, the last day of the option (May 8 was a Sunday, Record 134), appellant wrote to appellee electing to cancel the lease and demanding the return of the \$50,000 option money (Exhibit 1, Record

(136). He named the lease to Surf Associates and the architect's claim as his reasons.

On January 20, 1961, Weed, Wallace & Associates, Inc., filed a mechanics' lien in the Circuit Court of the First Circuit, State of Hawaii, against Surf Associates, Inc., Waikiki Manor, Ltd., appellee and Mr. and Mrs. Smyth in the amount of \$64,661.63 unpaid architect's fees (Exhibit 8A).

On February 1, 1961, appellant filed this action against appellee for the return of the \$50,000 option money and for \$28,025.46 expenses made in reliance on the option (Record 2-11).

On February 9, 1961, the persons against whom the lien was filed brought suit in the First Circuit Court to have the lien vacated and cancelled. They admitted the existence of the contract between Surf Associates, Inc., and the architects, and made no claim that it had been paid (Exhibit 8A).

On April 30, 1963, the First Circuit Court vacated the lien. The reason stated was that, as the project had been abandoned before any permanent physical work was done, there had been no improvement of the property, and the architect's claim was outside the purview of the

mechanics' lien statute (Exhibit 8D).

On May 9, 1963, the pretrial order herein was filed (Record 133-149) and shortly thereafter the case was submitted to the Court below on the facts and testimony as stated therein.

On December 11, 1963, judgment for the appellee was entered (Record 206-207); and

On January 7, 1964, the judgment was amended to include attorney's fees (Record 225).

On May 10, 1965, this Court remanded without passing on the merits, because the issue of the lack of diversity raised by defendant, appellee had not been satisfactorily determined (345 F. 2d 173 [1965]).

On October 17, 1967, the Court below entered judgment for appellee, reiterating and reaffirming its original decision (Record 256-257), after finding that appellee's principal office was located in Santa Barbara, California (Record 254).

QUESTIONS PRESENTED

1. Does an option to give a lease "which shall include generally the usual terms and conditions contained within a land lease covering business or hotel properties

in Hawaii" imply that a covenant of title will be included in the lease?

2. Can such an implied covenant be contradicted by parol evidence?

3. Does an option offering a lease "from and after and retroactive to" a certain date covenant that the optionor can give such a lease on that date?

4. Is an optionor in default if it is impossible for him to comply with the terms of his option even though the option is not exercised?

SPECIFICATIONS OF ERROR

The Court below erred in giving judgment for appellee because:

1. The Court below erred in holding that no covenant of title was implied in the option agreement.

2. The Court below erred in allowing parol evidence to vary the covenant of title implied in the lease as a matter of law.

3. The Court below erred in holding that appellant had to exercise his option in order to show that appellee was in default.

SUMMARY OF ARGUMENT

The errors made by the Court below sprang from the failure to recognize the significance of the unusual fact that the lease was to be "from and after and retro-active to March 8, 1960," the date of the option agreement.

In the option agreement, appellee promised to give a lease including "the usual terms and conditions," effective the date of the option agreement. Since a covenant of title is implied (unless it is expressed) in the usual lease, it was impossible for appellee to keep the promise of its option agreement unless it could give such a covenant on March 8, 1960.

An optionee is entitled to the return of his option money if the optionor is unable to comply with the terms of the option. The optionor in this case bargained away any reasonable time to make good his title by covenanting that he could give good title as of the first day of the option, rent to be retroactive to and paid from that date.

The Court below found that appellant "was fully aware of the situation, including the outstanding lease to Surf Associates, Inc.," before the signing of the option (Record 203) and that because of this knowledge, appellee

could have complied with the option agreement by cancelling the lease to Surf Associates, Inc. This decision was erroneous because it allows an understanding implied from parol evidence to vary the covenant of title implied by law in the written agreement. It is, moreover, erroneous because appellee never showed that the Smyths could transfer the lease from one corporate pocketbook to the other without perpetrating a fraud on the creditors of Surf Associates, Inc.

ARGUMENT

I. THE OPTION AGREEMENT PROMISES THAT APPELLEE CAN GIVE A GOOD COVENANT OF TITLE ON MARCH 8, 1960, THE DATE OF THE OPTION AGREEMENT.

The option is for a lease. The first thing the option agreement tells us about the offered lease is that it is to begin March 8, 1960:

4. Terms of Lease Subject to Option. In the event that Second Party shall exercise said option within the allotted sixty (60) day period, he shall be entitled to and obligated for a lease of such property on the following terms and conditions:

(a) Term of Lease: Said lease shall be for the term of fifty-five (55) years from and after and retroactive to March 8, 1960, being the date of this instrument. (Exhibit 4, p. 2)

It is thus explicit that at whatever time during

the option period the appellant might exercise his option, the terms of the lease would refer back to the date the option agreement was made. This is confirmed by the provision that the rent will begin March 8, 1960, the \$50,000 option money to be the first six months' rent (Exhibit 4, para. 4(b)(1), pp. 2-3).

The option agreement also expressly provided that the lease would "include generally the usual terms and conditions contained within a land lease covering business or hotel properties in Hawaii, including clauses relating to maintenance of insurance, maintenance and replacement of buildings, restrictions on assignability and similar typical lease clauses" (Exhibit 4, p. 10).

It is thus clear and explicit that the lease offered was to contain the "usual terms and conditions" effective March 8, 1960. The only vagueness was as to what these "usual terms and conditions" are. There can, however, be no doubt that they would contain a covenant of title. Covenants of title are implied in a lease by Hawaiian law.

Lee Hoy v. Kapiolani Estate, 26 Hawaii 489 (1922) quoting Rawle's Covenants, Sections 272, 273:

With respect to estates less than free-

hold, covenants for title were from the earliest times implied not only from the words of leasing, such as 'demisi,' 'concessi,' or the like, but even from the relation of landlord and tenant, and such is the law at the present day, unless where, as in some of the United States, it has been altered by legislation.

The covenants for title thus implied from the words of leasing were and are two -- first, a covenant that the lessor has the power to demise, and secondly, a covenant for quiet enjoyment.

See also: Stott v. Rutherford,
92 U.S. 107, 109 (1875);

1 Tiffany, Landlord and Tenant,
Section 80 (1910 Ed.);

1 American Law of Property,
Section 3.46;

51 C.J.S., Landlord and Tenant,
Section 239.

The covenant of good title and right to lease is broken when given, and no eviction is required.

1 American Law of Property,
Section 3.46;

51 C.J.S., Landlord and Tenant,
Section 239.

Thus it was held in McAlester v. Landers, 70 Cal. 79, 11 P. 505 (1886), where a portion of the property leased was already leased to another, that the lessor broke his

covenant of title as soon as he made it.

The lease would, of course, have been signed and delivered only after the exercise of the option. But the agreement provided that it would be retroactive to March 8, 1960, and the appellee would receive rent from that date. There is no way in which a lease containing the usual terms could be effective as of March 8, 1960, unless appellee could give a covenant of title as of that date.

II. APPELLEE WAS IN DEFAULT EVEN THOUGH APPELLANT HAD NOT EXERCISED THE OPTION.

The Court below held as follows (Record 201, Court's footnotes, emphasis added):

A person may contract to sell land which he does not own. There is no implied covenant that he has a clear, or any, title at the time the contract is entered into. His only obligation is to be able to convey a clear title at the time agreed upon for a conveyance. 2/ There is no difference in this respect between an agreement to convey title and an agreement to give a lease. It necessarily follows that, unless plaintiff exercised the option and defendant was unable at that time to execute a valid and clear lease, defendant would not be in default under the option agreement. As has been pointed out, plaintiff did not exercise the option.

2/ JOYCE v SHAFER (1893), 97 Cal. 335, 32 P. 320 See also, LUETTE v. BANK OF

ITALY NAT. TRUST & SAVINGS ASS'N. (1930),
9th Cir., 42 F. 2nd 10.

The proposition that "a person may contract to sell land which he does not own" is undoubtedly true.

In this case, however, there was a clearly expressed covenant that appellee could give a lease beginning the very day the option was executed. In such a case the optionee is entitled to rescission and the return of his option money without exercising the option. The reason for this distinction is succinctly stated at 55 Am. Jur., Vendor and Purchaser, Section 44:

The consideration for the money paid for an option is the right to call for a conveyance during the time limited, and ordinarily, if the option is not exercised during the time, no claim arises against the vendor for the money paid; but if the option requires the conveyance of good title, and the title is defective the purchaser may rescind and recover back the consideration paid. And where he is entitled to call on the vendor for the conveyance of a good title at any time during the life of the option, the vendor must be in a position at all times to comply with such a request, and if the purchaser, within the time named in the option, ascertains that the vendor has no title and therefore cannot make a good conveyance of the land named, he may at once rescind the option and recover what he has paid thereunder, without first tendering payment and demanding a conveyance, and it is immaterial that the vendor after notice of the rescission offers and is in a position to make a good title.

The cases cited by the Court below deal with installment sales in which the conveyance was to be made only after all installments were paid. They are part of a line of California cases, some of which deal with options and support the distinction made in the passage from American Jurisprudence quoted above.

In Seeburg v. El Royale Corp., 54 Cal. App. 2d 1, 128 P. 2d 363 (1942), rescission without prior exercise of the option was denied expressly because, "Here the plaintiff's option allowed the defendant thirty days after acceptance to comply with the terms of the option; . . ." by which fact the Court distinguished the case from Burks v. Davies, 85 Cal. 110, 24 P. 613 (1890), and Backman v. Park, 157 Cal. 607, 108 P. 686 (1910).

In Burks v. Davies, the optionee had a 23-day option to purchase land. He discovered that the optionor did not have title to part of the land involved and sent the optionor a notice of rescission which arrived, like the one in the case at bar, on the last day of the option. The optionor immediately offered to clear up the defect and did in fact obtain an offer of sale from the true owner the next day. The California Supreme Court required the return of the option money, quoting Goetz v. Walters, 34 Minn. 241, 25 N.W. 404 (1885):

He (the optionor) was bound to be prepared at all times within the thirty days to convey a good title, and, whenever within that time she (the optionee) should ascertain that he had no title, so that it was impossible for him to make a conveyance, she could at once avoid the contract without going to the useless trouble of tendering payment and calling on him to convey.

In Backman v. Park, 157 Cal. 607, 108 P. 686 (1910), the California Supreme Court reconciled Burks v. Davies with Joyce v. Shafer [cited in the decision below as holding that a person may sell what he does not own, (Record 201)], pointing out that where an option can be exercised at any time, the optionor must always be ready to perform and must, therefore, always have good title.

See also: Tatum v. Levi,
117 Cal. App. 83, 3 P. 2d 963 (1931).

The Court below erred in attempting to apply one hard and fast rule to all options, whereas there are a significant variety. For instance, Doe may give Roe an option to purchase Blackacre, the conveyance to be made thirty days after Roe exercises the option by paying Doe half the purchase price of \$50,000. Doe has bargained for the time and the money with which to perfect his title to Blackacre. In such a case he is obviously not in default until he has had the time and money he

bargained for. On the other hand, Doe might give Roe an option to buy Whiteacre with the covenant that Doe already had clear title. In such a case, Roe has bargained and paid for the assurance that he is buying a "bird in the hand."

In this case, appellant paid \$50,000 for a "bird in the hand," the promise that appellee could give a lease effective the first day of the option period. If that promise was untrue, appellant did not get what he paid for. In this case, there was a great difference between the "bird in the hand" and the "bird in the bush." Any cloud on the title could, and probably did, jeopardize appellant's attempts to finance the \$3,200,000 hotel which the proposed lease required him to build (Exhibit 4, p. 9).

Moreover, exercising the option would have not only incurred an obligation to spend \$3,200,000 improving property of dubious title, it would also have prevented appellant from questioning appellee's title. It is generally recognized that exercise of an option works an equitable conversion. 91 C.J.S., Vendor and Purchaser, Section 13, p. 865; 43 Am. Jur., Vendor and Purchaser, Section 43. For this reason, and because the term of the

lease and the obligation for rent were to be retroactive to March 8, 1960 (Exhibit 4, pp. 2-3), there was a serious risk that exercise of the option would be held to have automatically created the relationship of landlord and tenant. It is established Hawaii law that a lessee is estopped to assert a defect in his landlord's title.

Keelikolani v. Robinson,
2 Hawaii 436 (1861);

Peterson v. Frazier,
18 Hawaii 457 (1907);

Kaui v. See Kang,
20 Hawaii 690 (1911).

Ordinarily a tenant is protected from the harshness of this rule because eviction will terminate his obligation for rent, but this would be cold comfort to appellant if it happened after he built the \$3,200,000 hotel. The implied covenant of title was no trifling technicality; it was essential that appellee have a clear title before appellant incurred the onerous obligations laid on him by the lease by exercising the option.

III. THE IMPLIED COVENANT OF TITLE COULD NOT BE VARIED BY PAROL EVIDENCE.

The question of the use of parol evidence was raised by appellant (Record 202) and preserved in the pre-trial order (Record 148).

Testimony was not taken at trial, but was stipulated to in the pre-trial order, the pertinent parts of which are at pages 143-146 of the record. Theodore H. Smyth's testimony was stipulated as follows (Emphasis has been added, Record 145):

Mr. Smyth would testify that on March 7, 1960 and March 8, 1960 in the law offices of Lewis, Buck and Saunders, Honolulu, Mr. Smyth attended negotiations between Mr. Saunders and Mr. Barkhorn wherein Mr. Smyth heard Mr. Saunders tell Mr. Barkhorn prior to the signing of the option agreement that Adlib Associates, Inc. had granted a lease to Surf Associates, Inc. but that that lease was in default; that Surf Associates had some substantial losses which should be recouped if possible; that neither Mr. Saunders nor Mr. Smyth were certain which corporation should be the optionor; that since Adlib Associates, Inc. owned the fee, it should be the optionor but that it was expressly understood that the right to substitute Surf Associates, Inc. as optionor was agreed; that Adlib Associates, Inc. also had the ability to cancel the lease because Mr. and Mrs. Smyth were president and vice-president respectively of both Adlib Associates, Inc. and Surf Associates, Inc., and that Mr. and Mrs. Smyth and their attorneys comprised the board of directors of both corporations and that Mrs. Smyth was the sole stockholder of both corporations.

Mr. Barkhorn replied that he was not concerned as to whether Adlib Associates, Inc. or Surf Associates, Inc. gave him an option just as long as he got the property.

Mr. Saunders' testimony as stipulated was substantially the same (Record 144-145). Appellant Barkhorn's (Record 143-144) is also similar except that:

. . . Mr. Barkhorn does not recall any statement that the Surf Associates lease was outstanding or that Surf Associates could be substituted as optionor (Record 143)

The parties then signed the written agreement (Exhibit 4) in which every act normally associated with a lessor is associated with appellee, in which appellee is called the Lessor (Exhibit 4, p. 2), and in which there is no mention anywhere in its eleven pages of the existence of any outstanding lease, the substitution of another party as optionor, or any reference whatsoever by name or description to Surf Associates, Inc.

Even if there were some sort of a provisional understanding between the parties, appellant and appellee abandoned it when they left it out of their written agreement. The parol evidence rule prevents the use of these prior conversations to vary the express

terms of the written agreement, for instance by reading into it the agreement that Surf Associates, Inc., could be substituted as optionor. The parol evidence rule also forbids their use to vary the covenants implied in the written agreement by force of law.

Bishop Estate Trustees v. Castle & Cooke,

45 Hawaii 409, 368 P. 2d 887 (1962):

The extrinsic evidence of the surrounding facts and circumstances existing prior to, contemporaneously with and subsequent to the execution of the deed, as alleged, in the amended complaint, is not competent to contradict, defeat, modify or otherwise vary the meaning or legal effect of the deed. (Emphasis added, citations omitted) The parol evidence rule, being a rule of substantive law, precludes the consideration of this extrinsic evidence (45 Hawaii 422, 368 P. 2d 894)

32 C.J.S., Evidence, Section 852:

The legal effect of a written instrument, even though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, defeated, modified, varied, explained, or controlled by parol or extrinsic evidence than if such effect had been expressed.

See also: 2 Jones, Evidence, 5th Ed.,
Section 466, n. 3.

A case in point in the present situation is LaFrance v. Kashishian, 204 Cal. 643, 269 P. 655 (1928), where a suit was brought for breach of an implied warranty of title and quiet enjoyment and the Court held that parol evidence showing a different understanding as to title at the time of entering the contract could not be introduced under the parol evidence rule for the reason that it varied the legal effect of the contract.

The objection was raised by appellant (Record 148) and rejected by the Court below (Record 202):

Plaintiff objects to evidence as to information given him orally by persons acting in behalf of defendant, on the ground that it contradicts the claimed "implied warranty of title." The Court has ruled that there was no "implied warranty of title" during the existence of the option agreement. Therefore, such testimony, if material, would not be excluded by the parol evidence rule.

Once again the error stems from misreading the option agreement so as to leave out the fact that it promises a covenant of title effective March 8, 1960.

IV. THE ENCUMBRANCES ON THE PROPERTY CONSTITUTED A BREACH OF COVENANT.

1. The option agreement said that the lease would be "from and after and retroactive to March 8, 1960." The covenant of title would be that appellee had sufficient title to give a lease on that day. Unless appellee had title on March 8, 1960, it could not give a lease effective that day. As has been pointed out above, the assurance that the bird already was in the hand was a valuable consideration for which appellant had bargained and paid. Appellee's ability to subsequently clear the deficiencies in its title is not even the substantial equivalent of what it promised.

2. The Court below erred in assuming that because the State Court vacated the architect's lien, that there had, therefore, been no cloud on appellee's title. It is generally recognized that the likelihood of litigation involving a substantial question of fact or law is a cloud on title: "Thus a title may be such that a titleholder would prevail in an action of ejectment or in a suit to quiet title, and yet the title may be an unmarket-

able one." 92 C.J.S., Vendor and Purchaser, Section 191
(c).

See also: 92 C.J.S., Vendor and Purchaser,
Sections 191, 196;

3 American Law of Property,
Section 11. 48;

55 Am. Jur., Vendor and Purchaser,
Sections 174, 175.

The work done by the architects included making:

. . . plans for a small building, called a mock-up, which was a model or replica of an apartment as the apartments were expected to appear in the apartment building. The mock-up was not affixed to the land, and was to be removed when it ceased to be used for advertising purposes or when the construction of the building was commenced. The mock-up was completed and the last work thereon was performed on November 11, 1959 (Exhibit 8C)

The Hawaii mechanics' lien statute provides:

Any person or association of persons furnishing labor or material in the improvement of real property shall have a lien upon the improvement as well as upon the interest of the owner of such improvement in the real property upon which the same is situated, or for the benefit of which the same was constructed, for the price agreed to be paid (if the price does not exceed the value of the labor and materials), or if the price exceeds the

value thereof or if no price is agreed upon by the contracting parties, for the fair and reasonable value of all labor and materials covered by their contract, express or implied.

Where the terms of a lease, contract of sale or instrument creating a life tenancy require the improvement of the real property, the interest of the lessor, vendor or remainderman in the improvement and the land upon which the same is situated shall likewise be subject to the lien, and any provision for forfeiture or other penalty against the lessee, vendee or life tenant in case of the filing of a mechanic's or materialman's lien or actions to enforce the same, shall not affect the rights of such lienors. (R.L.H. 1955, Section 193-41)

Section 193-40 includes several definitions:

"Improvement" includes the construction, repair, alteration of or addition to any building, structure, road, utility, railroad or other undertaking or appurtenances thereto, and includes any building, construction, erection, demolition, excavation, grading, paving, filling in, landscaping, seeding, sodding, and planting, or any part thereof existing, built, erected, placed, made or done on real property, or removed therefrom, for its benefit.

"Labor" includes professional services rendered in furnishing the plans for or in the supervision of such improvement.

The decision of the State Court vacating the lien was apparently based on appellee's argument that the model apartment was not a permanent improvement of the

land. This decision could not be safely predicted. Any improvement is more or less temporary, and the statute includes such evanescent improvements as "seeding, sodding and planting." Nor does it require that the improvement be "affixed" but instead says "situated." It is clear from Theodore H. Smyth's letter to appellant on March 28, 1960 (Exhibit 2), that the model remained on the land long after the Waikiki Manor project was abandoned, and that Smyth thought it would be of value in appellant's sales. In fact, he offered to sell it to appellant for nearly \$8,000. Had this evidence been made available to the State Court, its decision would probably have been different from the one it made. (Exhibit 8D shows that the lienor presented neither evidence of facts nor arguments of law to the State Court.)

There is genuine doubt as to the meaning of the Hawaii mechanics' lien statute. Another judge of the same First Circuit Court determined that an architect did have a lien arising from another abandoned apartment house project of which the only thing actually erected was a sign advertising the project erected on the site, for which sign the architect had made a sketch.

Wagner v. Martin, First Circuit Court, State of Hawaii, Civil No. 8606, decision of Dyer, J., March 27, 1962. The decision, with a statement of the facts extracted from the record, is set forth in the appendix to this brief.

3. The Court below held that the fact that Surf Associates, Inc., had never paid any rent gave appellee the right to cancel the lease, which cancellation would satisfy the option agreement (Record 200-201). Aside from the fact that the cancellation would not enable appellee to perform its promise to give a lease effective March 8, 1960, it was never proven that such a cancellation could not be set aside as a fraud on creditors. The evidence strongly suggests that it could have been set aside. To summarize:

(a) Appellee and Surf Associates, Inc., were both the sole property of Elizabeth M. Smyth, and under the complete control of her and her husband (Record 137).

(b) That Surf Associates, Inc., never paid the rent due under the lease, which consequently was in default from and after July 21, 1959 (Record 137, Exhibit 7).

(c) That after the default, Surf Associates, Inc., contracted with the architects (Record 137). In the lien suit, Surf Associates, Inc., and appellee admitted the existence of this contract and made no claim that the payments made by Surf Associates were full payment thereof (Exhibit 8A, 8C).

(d) That, in Theodore H. Smyth's words, "Surf Associates had some substantial losses which should be recouped if possible" (Record 145).

(e) That the architects were prepared to litigate their claim and appellee knew it (Exhibit 2). When the architects brought suit, they did not sue Surf Associates, Inc., in contract, but sought a remedy against the other persons involved.

With the exception of the last paragraph, (e), these facts were the extent of appellant's knowledge at the end of the option period. It was not clear whether Surf Associates, Inc., was not paying its rent and architects' fees from choice or necessity or a mixture of both, but it was clear that it was not paying its debts as they came due.

To some courts the inability to pay debts as they come due by definition is insolvency.

Wilkinson v. Livingston,
45 F. 2d 465 (8th Cir. 1930);

Cohen v. Sutherland,
257 F. 2d 737 (2d Cir. 1958);

29 Am. Jur., Insolvency,
Section 2, n. 14.

Whether this is the Hawaii definition of insolvency is not decided. It is decided that the transfer of property while "the transferor is indebted or insolvent" is one of the "badges of fraud" listed in Achiles v. Cajigal, 39 Hawaii 493, 497 (1952). Another one, that "the conveyance is made while a suit against the debtor is pending or threatening" was clearly present in this case, and a transfer from one family corporation to another owned and controlled by the same people is either covered by or analogous to a third, "The conveyance is made to a family member or to one of close relationship." The Hawaii Supreme Court said of this list of badges of fraud that:

None of these alone proves fraud but warrants an inference of fraud, particularly where there is a concurrence of many badges.
(39 Hawaii 497)

Surf Associates, Inc., was admittedly in debt, and although the conveyance was formally a cancellation

for default, the testimony of the Smyths and their lawyer had been insistent on the fact that it was really a voluntary conveyance which the Smyths might or might not make as it suited them from one corporate pocketbook to the other. In such a situation, the burden was on appellee to prove that the conveyance would not be fraudulent.

Ga Nun v. Palmer, 216 N.Y. 611, 111 N.E. 223

(1916):

The rule is that a transfer without consideration by one who is then a debtor raises a presumption of fraud. The creditor may stand upon that presumption until it is repelled. It is not for him to show what other property was retained. (Cardozo, J.)

Feist v. Druckerman, 70 F. 2d 333 (2d Cir.

1934):

It imposes on the volunteer transferee of one who has creditors the duty of going forward with proof to show the solvency of the transferor in order to prevent the conveyance from being set aside. The presumption has existed in many of our states, and we see no reason to suppose that the uniform acts proposed to destroy such a rule of procedure (A. N. Hand, J.)

Kemp v. Metropolitan Life Ins. Co.,
205 F. 2d 857, 864 (5th Cir. 1953);

Hartman v. Lauchli,
238 F. 2d 881, 888 (8th Cir. 1956),
cert. denied, 353 U.S. 965;

Westminster Sav. Bank v. Sauble,
183 Md. 628, 39 A. 2d 862 (1944);

37 C.J.S., Fraudulent Conveyances,
Section 100, n. 86.

This rule applies only to voluntary conveyances, which normally means only those for which there is no consideration. If Surf Associates, Inc., were a stranger to appellee and the Smyths, the cancellation of the lease would not be a voluntary conveyance, but in such a situation, appellee could not claim that it was certain of promptly clearing its title. Appellee's argument, as its evidence so strongly emphasizes, is that the cancellation would be voluntary on both sides because the Smyths controlled Surf Associates, Inc., which would surrender possession, and would not litigate appellee's right to cancellation.

Appellant, at the time that he had to decide whether to rescind or go ahead with the option, was faced with at least a probability that any measures taken by appellee to correct the defects in its title could be set aside as in fraud of creditors. The cancellation of

the lease carried at least two, and perhaps three of the badges of fraud listed in Achilles v. Cajigal, 39 Hawaii 493, 497, and as the Court said in that case, each of them "warrants an inference of fraud."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

DATED: Honolulu, Hawaii, April 3, 1968.

Respectfully submitted,

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APPENDIX

1. Exhibits. All exhibits were identified and received in evidence as part of the pre-trial order (Record 147):

- 1 Letter, dated May 9, 1960, from Barkhorn Associates (Charles J. Barkhorn, Jr.) to Adlib Associates, Inc. re Option Agreement of March 8, 1960.
- 2 Letter dated March 28, 1960, from Theodore H. Smyth to John Barkhorn.
- 3 Letter dated March 8, 1960, from John Barkhorn to Theodore H. Smyth and Mrs. Elizabeth M. Smyth.
- 4 Copy of Agreement dated March 8, 1960 by and between Adlib Associates, Inc., and Charles John Barkhorn, Jr., (the Option Agreement).
- 5 The proposed substitute first page and page 11 of the Option Agreement (Exhibit 4), executed by Surf Associates, Inc., only.
- 6 Copy of Land Court Document No. 244549, referred to in paragraph 6 of the Option Agreement (Exhibit 4).
- 7 Copy of Indenture of Lease, made July 1, 1959, by and between Adlib Associates, Inc., and Surf Associates, Inc.
- 8 Copies of the following papers filed in Civil No. 7370, Adlib Associates, Inc., et al, plaintiffs, vs. Weed, Wallace & Associates, Inc., defendant, First Circuit Court, State of Hawaii:
 - 8-A Complaint and Exhibit 1 (being M.L. No. 1298, Circuit Court, First Judicial Circuit, Hawaii).
 - 8-B Answer

- 8-C Motion for Summary Judgment by plaintiffs, etc.
- 8-D Order granting Motion for Summary Judgment by plaintiffs and Judgment.
- 9 Letter dated May 6, 1960, from Barkhorn Associates to Colony House Purchaser.

2. Unreported decision in Wagner v. Martin,
Circuit Court of the First Circuit, State of Hawaii,
Civil No. 8606, Dyer, Jr., March 27, 1962. The fol-
lowing is the complete text of the decision, together
with affidavit of the lienor setting forth the facts
upon which the case was apparently decided:

CIVIL NO. 8606

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CHARLES F. WAGNER,)
)
Plaintiff,)
)
vs.)
)
WATTERS O. MARTIN, DOLORES M.)
MARTIN, RUTH QUAY SMITH, and)
MAHIOLE ENTERPRISES, LTD.,)
)
Defendants,)
)
and)
)
FIRST NATIONAL BANK OF HAWAII,)
et al.,)
)
Garnishees.)

DECISION

From the Plaintiff's Supplemental Affidavit
filed November 13, 1961, it appears to the Court that

when the evidence is in, Plaintiff may have at least a lien for the fair value of the water color that went into the sign.

I do not agree with the view that the structure must benefit the property in order for labor to be lienable, in view of the first part of the definition of "improvement" in Sec. 193-40 which makes no reference to benefit, and in view of the alternative language used in Sec. 193-41 giving a lien "upon the interest of the owner of such improvement in the real property upon which the same is situated, or for the benefit of which the same was constructed,-----" (Underscoring added).

There is no need at this time to determine whether the lien, if any, could embrace all of the professional services rendered by the Plaintiff.

The notice for summary judgment is denied.

Dated at Honolulu, Hawaii, this 20th day of March, 1962.

(SEAL)

/s/John F. Dyer
JUDGE OF THE ABOVE ENTITLED COURT

SUPPLEMENTAL AFFIDAVIT

STATE OF HAWAII)
CITY AND COUNTY) ss.
OF HONOLULU)

CHARLES F. WAGNER, being duly sworn, on oath
deposes and says:

He is the plaintiff in the above entitled
action and a resident of Honolulu, Hawaii;

He is a duly registered architect hired by
defendants WATTERS O. MARTIN and DOLORES M. MARTIN to
perform architectural services in connection with cer-
tain improvements to be placed on the real property
situate on the corner of Kuhio Street and Kaiulani Ave-
nue, Honolulu, Hawaii, all as more particularly described
in the complaint filed in said action;

Architectural plans and specifications and
other services in connection with and in furtherance of
said employment were fully furnished and provided insofar
as affiant was so permitted by the said defendants who
refused to proceed with their agreement to complete the
building;

A part of said plans and specifications were
furnished and used in the improvement of the real

property aforesaid;

The plans and specifications so furnished to WATTERS O. MARTIN and DOLORES M. MARTIN included a watercolor painting embodying the studies, drawings, plans and other work affiant had done and made;

It is customary for an architect performing architectural services for an apartment building to furnish such a watercolor painting as part of the required plans and specifications;

Said watercolor painting was specifically requested by said WATTERS O. MARTIN so he could use it to guide a sign painter in preparing a sign to be erected upon the said premises;

Said watercolor painting was enlarged and copied by a sign painter upon a sign approximately twelve feet high and five feet wide to illustrate The Chief, a building to contain "150 spacious one-bedroom apartments," and among other things naming the following:

ESCROW AGENT	BANK OF HAWAII
ARCHITECT	CHARLES F. WAGNER
GENERAL CONTRACTOR	PACIFIC CONSTRUCTION COMPANY
DEVELOPERS	MAHIOLE ENTERPRISES, LTD. WATTERS O. MARTIN, PRESIDENT
INTERIOR DECORATORS	C. S. WO & SONS

Said sign further announced that the project was bonded and that the Sales Office was located at 1837 Kalakaua Avenue.

The aforesaid improvement included excavation of the land to provide post holes, and the building, erection and placing on said premises for the benefit thereof of a construction, erection and structure, to wit, the aforesaid sign, incorporating the professional work product of affiant as aforesaid;

The said real property is very valuable, being located in a hotel and apartment house zone, and contains three or more old and dilapidated wooden structures.

The facts stated herein are known to affiant through his personal observation and are based on inspections of the property, including observation both prior to and since the commencement of this suit.

* * *

Nos. 22,441 and 22,441-A

**United States Court of Appeals
For the Ninth Circuit**

SHELL OIL COMPANY,

Appellant,

vs.

No. 22,441

RUSSELL L. JONES, et al.,

Appellees.

RUSSELL L. JONES, et al.,

Appellants,

vs.

No. 22,441-A

SHELL OIL COMPANY,

Appellee.

**On Appeal from the United States District Court
for the Northern District of California**

**BRIEF FOR APPELLEES (IN No. 22,441)
AND APPELLANTS (IN No. 22,441-A)**

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Nos. 22,441 and 22,441-A

United States Court of Appeals For the Ninth Circuit

SHELL OIL COMPANY,

vs.

RUSSELL L. JONES, et al.,

Appellant,

Appellees.

No. 22,441

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vs.

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Appellants,

Appellee.

No. 22,441-A

**On Appeal from the United States District Court
for the Northern District of California**

BRIEF FOR APPELLEES (IN No. 22,441)

AND APPELLANTS (IN No. 22,441-A)

JURISDICTION

This is in answer to a brief filed by Shell Oil Company (hereinafter referred to as "Shell") appealing from an order of the United States District Court for the Northern District of California entered on October 12, 1967 (R. 152-153) which granted a protective order (see Appendix "B" of this brief) pursuant to Rule 30(b) of the Federal Rules of Civil Procedure sealing the deposition

testimony of the 42 Shell Oil dealers (hereinafter referred to as "plaintiffs") who are plaintiffs in the present civil antitrust action.

This brief is also submitted in support of plaintiffs' separate appeal from an order (see Appendix "D" of this brief) of the same District Court entered on November 20, 1967 which denied a protective order sought pursuant to Rule 33 (insofar as it incorporates Rule 30(b)) to seal the plaintiffs' answers to certain of Shell's first set of written interrogatories (specifically, numbers 5, 12, 13, 14, 18, 19 and 20 which are set forth in Appendix "C").

The District Court has jurisdiction in this action pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 15. The plaintiffs contend, however, that the orders here involved are not appealable and thus this Court lacks jurisdiction to decide the issues presented herein. However, if this Court exercises jurisdiction either through appeal (28 U.S.C. § 1291) or extraordinary remedy (28 U.S.C. § 1651(a)) it should consider the two conflicting District Court orders together. For that reason, plaintiffs filed a Notice of Appeal from the denial of its motion for a Protective Order on December 11, 1967.

STATEMENT OF THE CASE

In this present cause filed on June 16, 1967, 72 independent Shell Oil Company dealers (located throughout Northern California) have instituted a civil antitrust action against their supplier, Shell Oil Company. The complaint (R. 1-11) charges that Shell, in furtherance of a

program intended to injure and impair its competitors, did embark upon a program of predatory pricing throughout Northern California in violation of Sections 1 and 2 of the Sherman Act and Section 2 of the Robinson-Patman Act. The complaint further charges that Shell, by economic coercion and duress, is able to dominate the important business decisions of its supposedly "independent" dealers thereby enabling it to establish and enforce its predatory prices for the purpose of eliminating competitors at various levels of the marketing process. The complaint seeks unascertained damages believed to be in excess of \$1,775,000 before trebling. At present there remain 42 plaintiffs.

The defendant Shell Oil Company then filed a counter-claim (R. 7, 11-19) against each of the 72 named plaintiffs (and unnamed co-conspirators identified only as dealers, associations of dealers and agents of same) alleging that said parties violated Section 1 of the Sherman Act by combining and conspiring to: (a) raise the retail price of gasoline; (b) increase and maintain uniform margins for service station dealers; (c) eliminate price signs; (d) eliminate trading stamps as a competitive factor; and (e) harass non-conforming service station dealers.

The allegations made by Shell in its counter-claim are substantially identical to the allegations contained in an indictment filed by the Government in the criminal case currently pending entitled *United States v. California Shell Dealers Association, Inc., et al.* (Criminal Case No. 41348 in the Federal District Court for the Northern District of California, R. 75-82).

Among the defendants in the criminal action are two dealer associations, the California Shell Dealers Association (in which each of the named plaintiffs in the present cause is a member), the Santa Clara County Shell Dealers Association (in which many of the named plaintiffs are also members), and three named dealers, John A. Mullins, Joseph Chandler and Earl C. Schweitzer (each of whom are plaintiffs in the present civil action). All of the accused defendants have pleaded not guilty, but the trial has been delayed and removed from the calendar pending disposition of a pre-trial motion under Rule 16 of the Federal Rules of Criminal Procedure.

Because of the similarity of the criminal indictment and the civil counter-claim, plaintiffs have contended that by submitting to the liberal discovery permitted by the Federal Rules of Civil Procedure, they would be compelled to incriminate themselves. Rather than move to stay the civil action until the termination of the already delayed criminal proceeding, plaintiffs sought to protect their constitutional privilege against self-incrimination by invoking the Federal Rules of Civil Procedure, Rule 30(b) and Rule 33 (insofar as it incorporates Rule 30(b)) which permits the sealing of depositions and interrogatory answers, prohibiting same from being examined except upon order of the Court and thereby keeping same confidential as against everyone except the parties to the civil action. Such protective orders would preclude the Government from utilizing the fruits of civil discovery as evidence and investigatory leads in the criminal prosecution of those presently indicted (as well as those plaintiffs who by their deposition testimony or answers to interrogato-

ries may implicate themselves in the alleged criminal activity). These protective orders would not limit the defendant Shell in its discovery techniques or access to information.

On October 12, 1967, the Honorable Stanley A. Weigel granted plaintiffs' motion for a protective order pursuant to Rule 30(b), sealing plaintiffs' deposition testimony. (See Appendix "B" hereto and R. 152-153.) Shell here appeals that order. On November 20, 1967, the Honorable William T. Sweigert denied plaintiffs' motion for a protective order pursuant to Rule 33 (insofar as it incorporates Rule 30(b)) to seal the plaintiffs' answers to numbers 5, 12, 13, 14, 18, 19 and 20 of defendant's first set of written interrogatories. Plaintiffs here appeal from the denial of that protective order. (The interrogatories involved are set forth in Appendix "C" and Judge Sweigert's order is set forth in Appendix "D" of this brief.)

ISSUES PRESENTED

A. Whether the orders of the District Court granting the plaintiffs' motion under Federal Rules of Civil Procedure 30(b), and denying plaintiffs' motion under Rule 33 (insofar as it incorporates Rule 30(b)) are appealable?

B. Whether the District Court in granting a protective order pursuant to Federal Rule of Civil Procedure 30(b) sealing the plaintiffs' deposition testimony, and protecting said plaintiffs' constitutional privilege against self-incrimination thereby abused its discretion?

C. Whether the District Court's denial of a protective order pursuant to Federal Rule of Civil Procedure 33 (insofar as it incorporates Rule 30(b)) and its refusal to seal plaintiffs' answers to defendant's written interrogatories is an abuse of discretion which thereby results in an unjustifiable abridgment of the plaintiffs' privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution?

SPECIFICATION OF ERROR

The District Court erred in denying plaintiffs' motion for a protective order pursuant to Rule 33 (insofar as it incorporates Rule 30(b)) of the Federal Rules of Civil Procedure.

ARGUMENT

I. THE ORDERS OF THE DISTRICT COURT BELOW ARE NOT FINAL APPEALABLE ORDERS. THEREFORE THIS APPEAL SHOULD BE DISMISSED.

The actions of the District Court below regarding plaintiffs' requests for protective orders relate to matters of discovery and primarily involve the discretion of the trial judge. It is well established that a discovery order is not "a final order and thus is not appealable". 2A Barron & Holtzoff, *Federal Practice and Procedure*, § 657 (1961), citing *Griffin v. Locke*, 286 F.2d 514 (9th Cir. 1961); *English v. Cunningham*, 282 F.2d 839 (D.C. Cir. 1960).

In *Cimijotti v. Paulsen*, 323 F.2d 716 (8th Cir. 1963), the District Court's refusal to require witnesses to an-

swer certain questions asked of them in a deposition was held not to be a final order and hence non-appealable.

In its brief, Shell cites many cases in an attempt to circumvent the established rule; however, Shell fails to persuasively demonstrate the need for appellate review of discovery orders. Shell urges (Brief, p. 18) that Judge Weigel's order sealing plaintiffs' depositions is "final" because it conclusively "determines Shell's right to retain possession of transcripts of depositions". However, as is developed more fully in other portions of the argument below, these deposition transcripts have no inherent value. They are of use only as memorializing information regarding the facts of this case. They are of value only in the litigation process. If the case should be settled as Shell implies, the depositions become useless. If the case proceeds to judgment, that will be time enough for appellate review of this matter.

Moreover, Shell's request for a Writ of Mandamus must also fail. The federal courts have consistently refused to allow the extraordinary writs to be used for reviewing discovery orders. *Will v. United States*, 389 U.S. 90 (1967); 2A Barron & Holtzoff § 657, citing *Pennsylvania R. Co. v. Kirkpatrick*, 203 F.2d 149 (3rd Cir. 1953); *Belships Co., Ltd. v. France*, 184 F.2d 119 (2nd Cir. 1950); *Benioff Co. v. McCulloch*, 133 F.2d 900 (9th Cir. 1943).

The Tenth Circuit has recently recognized that only under exceptional circumstances should a writ of mandamus issue in matters relating to discovery. To justify the issuance of the writ, the trial court must be guilty of a clear abuse of discretion or an abdication of

the judicial function. *Paramount Film Dist. Co. v. Civic Center Theatre, Inc.*, 333 F.2d 358 (10th Cir. 1964).

It is true that in the present case, two different District Court judges issued orders (concerning the same case) which are somewhat inconsistent. However, each judge was exercising his independent discretion regarding the scope of pre-trial discovery. The trial judge should be given great leeway in determining the ground rules for discovery. Such orders as the trial court makes are not final orders, hence the time is not right for appellate review. These appeals should be dismissed.

However, if this Court chooses to review Judge Weigel's order below, then it should likewise review the inconsistent ruling of Judge Sweigert (either as an appeal under 28 U.S.C. § 1291 or as a petition for a Writ of Mandamus under 28 U.S.C. § 1651(a)). The plaintiffs contend that the granting of a protective order by Judge Weigel was a sound and enlightened exercise of discretion in that it reflects the policy of protecting the plaintiffs' constitutional privilege against self-incrimination. On the other hand, Judge Sweigert's refusal to seal certain of plaintiffs' answers to interrogatories was an abuse of discretion in that it will necessarily result in an abridgment of the plaintiffs' constitutionally protected privilege.

II. PROTECTIVE ORDERS SEALING PLAINTIFFS' DEPOSITION TESTIMONY AND ANSWERS TO WRITTEN INTERROGATORIES ARE NECESSARY IN ORDER TO PRESERVE AND PROTECT THE PLAINTIFFS' PRIVILEGE AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION. ANY FAILURE TO ISSUE SUCH PROTECTIVE ORDERS IN THIS CASE MUST BE RECOGNIZED AS AN ABUSE OF DISCRETION.

A. Issuance of the Protective Orders Sealing Deposition Testimony and Interrogatory Answers Would Protect Each Plaintiff from Coercive Self-Incrimination and Encourage the Full and Cooperative Disclosure Required by the Federal Pre-Trial Discovery Rules. Such Orders Are Necessary in this Case to Protect the Plaintiffs from Annoyance, Embarrassment and Oppression.

The liberality of pre-trial discovery under the Federal Rules of Civil Procedure is surely one of the most beneficial and enlightened developments in modern jurisprudence. Private party litigants in the federal courts have the right to full pre-trial disclosure of their opponents' cases. Provisions for protective orders, however, "were adopted as a safeguard for the protection of parties and deponents in view of [this] almost unlimited right of discovery given by Rule 26". 2A Barron & Holtzoff, *Federal Practice and Procedure*, § 715 (Wright Ed. 1961). As one distinguished scholar has stated, the purpose of the protective order is "to prevent abuse of the discovery rules". Sunderland, *The New Federal Rules*, 45 W.Va. L.Q. 26 (1938).

In our present case, Shell, in (a) defending against the plaintiffs' claims and (b) pursuing its counterclaims against the plaintiffs seeks discovery of facts which of necessity must relate to alleged violations by plaintiffs of certain antitrust laws. The plaintiffs do not here con-

tend that Shell is prohibited from pursuing the various avenues of civil discovery. However, the plaintiffs urge this Court to recognize that the allegations made by Shell in its counterclaim are in substance identical to the charges made by the United States of America in a criminal antitrust proceeding now pending before the District Court for the Northern District of California. (Cf. R. 7, 11-19 with R. 75-82.) The criminal action has been filed against two service station dealer associations and three named individuals (John A. Mullins, Joseph Chandler and Earl C. Schweitzer—all of whom are party plaintiffs in the present civil action). *United States v. California Shell Dealers Association, et al.* (Criminal Case No. 41348) (R. 75-82). In point of fact, all of the individual plaintiffs herein are members of one or both of the dealer associations named as defendants in the criminal action. (R. 1-11.)

The very existence of concurrent criminal and civil actions which involve the same parties and relate to identical occurrences and transactions creates a danger that the avenues and fruits of civil discovery will be used to circumvent the parties' privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution. If the plaintiffs' deposition testimony and answers to interrogatories are not protected, then, as public records they become fully accessible to and usable by federal prosecuting authorities. *Barron & Holtzoff, supra.*

To prevent the emasculation of their privilege against self-incrimination the plaintiffs sought an order pursuant to Federal Rules of Civil Procedure 30(b) which provides in part:

“After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order . . . that *the examination shall be held with no one present except the parties* to the action and their officers or counsel, or that *after being sealed the deposition shall be opened only by order of the court* . . . or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression.” (Emphasis added.)

Pursuant to Rule 30(b) Judge Stanley Weigel issued an order, dated October 12, 1967, sealing the plaintiffs’ depositions. (R. 152-153.) Because this order was necessary to guard the plaintiffs’ privilege against self-incrimination and to “protect” the plaintiffs “from annoyance, embarrassment and oppression” it was issued pursuant to a valid and extremely sound exercise of discretion by Judge Weigel.

Subsequently the plaintiffs also sought a protective order sealing its answers to written interrogatories (Shell’s First Set numbers 5, 12, 13, 14, 18, 19 and 20, all of which are set forth in Appendix “C”, *infra*), in accordance with Federal Rules of Civil Procedure 33 which provides in part:

“ . . . The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.”

On November 20, 1967, Judge William Sweigert denied the plaintiffs’ motion (Appendix “D”, *infra*). The result of this denial is to compel all of the plaintiffs to submit

information which could implicate them in the alleged conspiracy which is the subject matter of the criminal anti-trust action. This flagrant disregard for the plaintiffs' privilege against self-incrimination clearly constitutes an abuse of discretion by the court below and an impairment of the plaintiffs' constitutionally protected liberty.

Plaintiffs contend that an enlightened and rational judicial resolution of this present conflict can be achieved only through the granting of both protective orders. Such orders would effectively protect plaintiffs from self-incrimination and at the same time permit liberal discovery by Shell. Indeed, if both protective orders are granted, not only those plaintiffs herein who are named defendants in the criminal action, but all of the plaintiffs in the present action (each of whom is now living under the specter of potential involvement in the criminal prosecution) will be encouraged to more willingly cooperate in the discovery process.

In opposing the protective orders, Shell has contended that those plaintiffs who are not named defendants in the criminal action have no right to invoke a privilege against self-incrimination. This contention is wholly without merit. The Ninth Circuit Court of Appeals has on numerous occasions followed the controlling test of *Hoffman v. U.S.*, 341 U.S. 479 (1951). That test does not limit the privilege to only those individuals who are under indictment or otherwise formally charged with criminal activity. On the contrary, as Judge Koelsch of this Court stated in *Hashagen v. U.S.*, 283 F.2d 345, 348 (9th Cir. 1960):

“The ‘guarantee against testimonial compulsion’ embodied in the Fifth Amendment to the United

States Constitution must be liberally construed and broadly applied in order to sustain fully the basic right it was designed to protect. . . . The *privilege* to remain silent may also be *validly asserted where an answer to a question would be likely to provide a lead or clue to a source of evidence of such crime* and thus furnish a *means of securing one or some of the 'links in the chain of evidence' required for a federal prosecution of the witness.*" (Emphasis added.)

Thus, witnesses in non-criminal proceedings and witnesses who are not formally charged with a crime may nevertheless invoke their constitutional right to remain silent whenever they are asked a question calling for information which could possibly implicate them in alleged criminal activity. *Hoffman v. U.S.*, *supra*; *Malloy v. Hogan*, 378 U.S. 1, 11-13 (1964); *Blau v. U.S.*, 340 U.S. 159 (1950); *Slochower v. Bd. of Education*, 350 U.S. 551 (1956); *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Alexander v. U.S.*, 181 F.2d 480 (9th Cir. 1950); *Shane v. U.S.*, 283 F.2d 355 (9th Cir. 1960).

The interrogatories propounded to the plaintiffs by Shell clearly call for information which could implicate each or any of the plaintiffs in the alleged criminal conspiracy which the Government is in the process of prosecuting. Each of the plaintiffs is a member of one or more dealer associations presently under indictment, and information furnished by any plaintiff (either through a deposition or an interrogatory answer) could provide a "lead or clue to a source of evidence" which would implicate such plaintiff in the alleged criminal conspiracy to violate the antitrust laws. As such the deposition tes-

timony and/or interrogatory answers of the plaintiffs could "furnish a means of securing one or some of the links in the chain of evidence required for a federal prosecution of the witness".

Because of the generality and breadth of information which may be relevant to an antitrust claim, discovery is necessarily extensive in scope. *Pennington v. United Mine Workers*, 325 F.2d 804, 811 (6th Cir. 1963) (reversed on other grounds, 381 U.S. 657); *Independent Production Corp. v. Loew's*, 22 F.R.D. 266 (S.D.N.Y. 1958); 2A Barron & Holtzoff, *Federal Practice and Procedures*, § 715 (1961). In its deposition examination, just as in its written interrogatories, Shell will doubtlessly wish to explore in detail the precise areas which the Government's pending criminal action concerns. Each of the plaintiffs would then be justified in asserting the privilege for fear that "the answers . . . possibly have [a] tendency to incriminate". *Hoffman v. U.S.*, *supra*, at p. 488. The presence and frequent but justified assertion of this constitutional right will disrupt and frustrate Shell's attempt to conduct a rational and orderly program of discovery. Without the protective orders, it would be only natural for the plaintiffs to give extremely guarded testimony and answers. For example, the specific interrogatories (see Appendix "C" of this brief) involved in plaintiffs' motion below call for information from each plaintiff as to gasoline prices, dates of changes in prices (Interrog. No. 5), practices regarding trading stamps (Interrog. No. 12), practices regarding the posting of price signs (Interrogs. Nos. 13 and 14) and activities within the indicted trade associations (Interrogs. Nos. 18, 19 and 20). All of these alleged activities are specified in the criminal indictment.

(R. 75-82.) Plaintiffs are naturally apprehensive about furnishing such information for fear of implicating themselves in the alleged conspiracy which the Government contends existed. However, the granting of the orders would make invocation of the privilege unnecessary thereby avoiding interference with Shell's discovery and encouraging the plaintiffs to fully cooperate in the discovery process.

Nothing in the record supports Shell's contention (at p. 15 of its brief) that the Antitrust Immunity Statute, 32 Stat. 904, 15 U.S.C. § 32 is applicable to this case. In *Brown v. U.S.*, 359 U.S. 41 (1959) cited by Shell, the testifying party was assured of *immunity from prosecution* prior to being held in contempt for refusal to testify. In fact, Shell has previously admitted that it desires to share the information it uncovers through discovery with the Government's prosecuting officials. (See Appendix "A" of this brief for the letter from the Department of Justice to the attorney for Shell, requesting copies of all depositions taken in connection with the civil case.) This will directly and effectively aid the Government's *present* criminal prosecution. Any mention of the immunity act, then, must be recognized as a subterfuge.

Nor does Shell offer any authority to support its unique contention (Brief, p. 16) that the order requiring it to turn over transcripts of the depositions to plaintiffs deprives Shell of its property without due process of law. Shell would ask this Court to believe that such transcripts have some inherent value. In fact, such depositions are of value only as a means of obtaining information relevant to the litigation. The protective order with its inci-

dental requirement of returning deposition transcripts to the plaintiffs is, then, but a necessary means of keeping the coercively revealed information confidential and thereby adequately protecting parties from compelled self-incrimination. Such a requirement is wholly consistent with the policies of the Fifth Amendment to the United States Constitution and with the dictates of Rule 30(b) of the Federal Rules in protecting parties "from annoyance, embarrassment or oppression." *International Products v. Koons*, 325 F.2d 403 (2nd Cir. 1963).

Recently, the Third Circuit recognized the propriety of a protective order to shield parties in civil antitrust actions from incriminating themselves in related pending criminal prosecutions. *U.S. v. American Radiator & Standard Sanitary Corp.*, 1967 Trade Cases No. 72,311 (3rd Cir. Cases No. 16,764 and 16,765, 1967). There, the District Court had stayed civil discovery pending the termination of a related criminal action. The Court of Appeals reversed. Judge Hastie observed that protective orders sealing discovery would be more appropriate to obviate possible self-incrimination by those who were defendants in the criminal action and those who, though not named, were apprehensive about revealing possible implication in the alleged criminal conspiracy.

Moreover, the Court further recognized that without a protective order, the information discovered would be open to possible publication by the mass media, thereby impeding the selection of an unbiased jury at the criminal trial. Judge Hastie stated:

"However, we recognize that the widespread publication of such evidence in advance of the criminal

trial might hamper the selection of an unbiased jury and thus prejudice the criminal defendant.”

The Court went on to rule that no justification exists for publicizing the fruits of civil discovery:

“Indeed, only the civil judge and the civil [parties’] counsel need know what is disclosed, and counsel may be expressly enjoined from sharing the information with other persons pending the criminal trial.”

B. Neither Shell Nor the Government Would Be Prejudiced by the Issuance of the Protective Orders. Indeed the Government Is Constitutionally Precluded from Utilizing, in the Criminal Proceeding, Any Information Developed Through the Compulsory Processes of Civil Pre-Trial Discovery.

The plaintiffs again emphasize that they are not here seeking to avoid complying with Shell’s request for discovery. On the contrary, plaintiffs have demonstrated that issuance of the protective orders will create an atmosphere of full and cooperative disclosure more in keeping with the spirit of federal discovery policies.

A closer scrutiny of the arguments against the protective orders, then, reveals Shell’s true purpose for opposing their issuance—to pressure and coerce plaintiffs into dismissing the civil action for fear of implicating and incriminating themselves in the related criminal prosecution. Shell admits that the Department of Justice has a “very real desire” to see the transcripts of plaintiffs’ depositions. Moreover, Shell brought to the attention of the Court below a letter from the Department of Justice officials requesting copies of all depositions (Appendix “A”, *infra*). It must be assumed that the Government would have an equally enthusiastic sense of curiosity

regarding plaintiffs' answers to interrogatories and other documents.

Shell justifies its proposed cooperative exchange of information with the Government by reliance on the "Publicity in Taking Evidence" Act, 15 U.S.C. § 30 (1964). This reliance is misplaced, for the Act is addressed to testimony which is taken by the Government. Plaintiffs are not here attempting to suppress information presently in the possession of the Government. Rather plaintiffs seek to preclude Shell from supplying potentially incriminating information to the Government.

Similarly, in *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964) this Court stated that Rule 30(b) should not be used to keep relevant information from private litigants seeking to enforce private antitrust claims. In *Olympic*, the Government already had the information and the removal of the protective order (which had for four to eight years prohibited the Government from divulging the information) in no way carried the risk of potential self-incrimination. Indeed, the Congressional statute and *Olympic* case cited by Shell could not be sustained if they are here construed to permit an impairment of the Fifth Amendment privilege against self-incrimination.

As Judge Koelsch of this Court stated in the *Hashagen* case:

"The emulous conflict between the government's right to information including the consequent duty of the citizen to testify, and the witness' right not to incriminate himself *must be balanced in favor of the Constitutional privilege*. If at times this results

in closing and locking the doors of discovery to the government, that is but a calculated and foreseen consequence of recognizing this *basic right in a free society*.” 283 F.2d at p. 348 (Emphasis added.)

Clearly, the Government, in its criminal action, is not entitled to the kind of discovery sought here. Important differences in policy account for the distinctions in civil and criminal discovery. Denial of the plaintiffs’ request for protective orders would be tantamount to abrogation of this wise policy distinction.

As the Fifth Circuit Court of Appeals astutely observed in the recent case of *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963):

“... [A] judge should be sensitive to the difference in rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. . . . Separate policies and objectives support these different rules.

“... A litigant should not be allowed to make use of the liberal [civil] discovery procedures . . . to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. *Judicial discretion should be utilized to harmonize the conflicting rules* and to prevent . . . the policies applicable to one suit from doing violence to those pertaining to the other.” (Emphasis added.)

Thus, the Government’s position, as articulated by Shell, is untenable. This Court should not use its power

to subject the criminally accused to the same processes of searching discovery which have heretofore been restricted to civil cases. Such an action by this Court would go far in the direction of negating the constitutional privilege against self-incrimination and thereby compelling an accused to convict himself through his own testimony. Such a ruling would do violence to the spirit of the recent line of Supreme Court decisions which have elevated the privilege to a nearly absolute level of constitutional protection. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Griffin v. Calif.*, 380 U.S. 609 (1965).

It is well established that this Court has the power, under Rule 30(b), to balance and resolve all of the conflicting interests and policies involved in this present dispute. Indeed, the Court should here use "equitable powers of courts of law over their own process to prevent abuses, oppression and injustices". *International Products v. Koons*, 325 F.2d 403, 408 (2nd Cir. 1963). The issuance of a protective order in this case would be unequivocally consistent with this standard: (a) it would foster and encourage a more effective program of discovery by Shell; and (b) it would protect plaintiffs' disclosures from being used against them in the pending criminal cause. Should the Government complain, its plea should be ignored. The Government, as criminal prosecutor, has no right to the fruits of civil discovery; it should not be heard to complain because it "lost" what would otherwise have been a "windfall". To permit Shell to use its discovery as a "club" to coerce plaintiffs to

incriminate themselves is the type of "abuse", "oppression" and "injustice" that Rule 30(b) was designed to prevent. *Harrigan & Sons v. Enterprise Animal Oil Co.*, 14 F.R.D. 333 (E.D. Pa. 1953).

In a number of cases in which parties to a civil action were also implicated in a pending related criminal case, courts have enthusiastically applied Rule 30(b) in order to protect the privilege against self-incrimination from being circumvented through the use of liberal civil discovery. *National Discount Corp. v. Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952); *Harrigan & Sons v. Enterprise Animal Oil Co.*, *supra*; *Perry v. McGuire*, 36 F.R.D. 272 (S.D. N.Y. 1964); *U.S. v. Parrott*, 248 F.Supp. 196 (D.C. 1965).

In the *National Discount* case, *supra* (at page 237 of the opinion), the Court ruled that to require a party against whom a criminal action was pending to submit to the normal avenues of civil discovery (in a related civil case) "*would be oppressive* and, at least, an indirect violation of his constitutional rights. *Justice requires* that the defendant . . . be protected from this type of oppression and this indirect invasion of his rights . . ." (Emphasis added)

In its brief (page 11, *et seq.*), Shell contends that it will be prejudiced in the preparation of its case if it is not permitted to disclose the information discovered to its operating personnel and other third parties. In making this contention, Shell has read a portion of the protective order out of its proper context. The parties and their counsel are given full access to information for the purposes of preparing their case. Counsel will be aware of

the information when he questions Shell's operating personnel and other third parties.

However, the constitutional rights of the plaintiffs must be protected. Thus Shell and its counsel may not freely reveal the testimony of the plaintiffs lest the federal prosecuting officials gain access thereto and utilize such potentially self-incriminating testimony to aid in the criminal prosecution of the plaintiffs. As Judge Hastie stated in *U.S. v. American Radiator & Standard Supply Corp.*, *supra*:

"Indeed, only the civil judge and the civil [parties'] counsel need know what is disclosed, and counsel can be expressly enjoined from sharing the information with other persons. . . ."

Typically the remedy afforded in these cases is an order staying civil discovery pending termination of the criminal prosecution. However, here the criminal action is delayed indefinitely (having been removed from the calendar) and the requested protective orders are far more reasonable under the circumstances.

Judge Hastie in the *American Radiator* case reversed a District Court's order staying civil discovery pending termination of a related criminal action, observing that application for a protective order would more appropriately resolve the competing interests involved.

United States v. Simon, 373 F.2d 649 (2nd Cir. 1967) is also instructive. There, Judge Bryan of the District Court for the Southern District of New York (where a criminal action was pending) enjoined the plaintiff in a related civil case (pending in the Eastern District of

New York) against the same defendant from proceeding with discovery. Although the Second Circuit Court of Appeals reversed, ruling that one court does not have the power to enjoin actions being taken in another court, Judge Lumbard in the majority opinion indicated that a claim by a criminal defendant that civil discovery “would be oppressive and would infringe on his constitutional rights” would be a proper basis for issuance of an order under Rule 30(b) by the court in which the civil action was pending. 373 F.2d at 654.

Thus, it is clear that a stay of proceedings is not necessary. The interests of the plaintiffs and of Shell would be fully protected and encouraged by the issuance of both protective orders sought by the plaintiffs.

Shell argues that if a protective order is permitted here, such will open the floodgates and stand as authority for issuance of similar orders in all civil antitrust cases (because of potential criminal sanctions). This is not true. Protective orders are necessary in the present case because of the existence of an *actual pending criminal case* which is *identical* in its *allegations* to the counterclaim in this civil action. This similarity of issues, combined with the announced desires of the federal prosecuting officials for copies of depositions, necessarily means that civil discovery will result in the disclosure of potentially incriminating information. Thus, plaintiffs need the protective orders to effectively safeguard their constitutional privilege against self-incrimination.

III. PLAINTIFFS HAVE NOT IRREVOCABLY WAIVED THEIR CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION BY THE FILING OR PROSECUTION OF THEIR CIVIL ANTITRUST SUIT AGAINST SHELL.

In opposing plaintiffs' motion for a protective order under Rule 30(b), defendant Shell argues that plaintiffs are somehow stripped of their constitutional protection because they have initiated the proceeding. Note, however, that Rule 30(b) does *not* indicate that only defendants may obtain protective orders. Clearly, such orders are available to all parties who show cause for issuance.

Even more astounding, however, is the defendant's implication that by the initiation of a civil action plaintiffs thereby waive their constitutional immunity from self-incrimination. Such an interpretation would demonstrate little regard for a constitutional protection of such high value. *Malloy v. Hogan, supra*; *Miranda v. Arizona, supra*.

This line of argument clearly illustrates Shell's true purpose in opposing the present order. For Shell is saying to the plaintiffs: unless you drop your antitrust claim, all the avenues of civil discovery which are available will be used to gather information and such will be communicated to the Government for use in its criminal prosecution against you. Plaintiffs have argued above that this Court should exercise its discretion and invoke its equitable power under Rule 30(b) to extricate plaintiffs from this oppressive and unjust dilemma. For if the Court approves the defendant's position and rules to deny protective orders, such action would effectively negate the plaintiffs' constitutional privilege against self-incrimination. Therefore, denial of the order would vio-

late the Fifth Amendment to the Constitution of the United States.

Recently, in *Stevens v. Marks*, 383 U.S. 234 (1966), the United States Supreme Court emphatically condemned procedural practices which mechanically operate in such a manner as to result in a waiver of the privilege. In that case, a policeman had signed a waiver of the privilege under pain of being discharged, but subsequently reconsidered and reinvoked his right to remain silent. The Court ruled that the reassertion of the privilege was justified:

“We hold that the petitioner’s effort to withdraw the waiver was effective, and that *in the absence of an immunity provision clearly made applicable to him*, petitioner could properly stand on his privilege and refuse to answer potentially incriminating questions”. (Emphasis added)

This language used by the Court has particular relevance to our present case. Shell seeks to coerce the plaintiffs into providing it with information which will be made available to assist the Government in the criminal prosecution of the plaintiffs. If this Court believes that the plaintiffs have waived their privilege by initiating the action—it must further recognize the significance of *Stevens v. Marks* and permit plaintiffs to reinvoke the constitutional privilege unless a protective order (comparable to “an immunity provision” in *Stevens*) is granted and “made applicable” to the plaintiffs. The plaintiffs are not here attempting to use the privilege against self-incrimination as a shield of silence and thereby prohibit the defendant from engaging in discov-

ery. The plaintiffs are most willing to submit to proper discovery so long as the information revealed is kept beyond the reach of the prosecuting authorities. Under *Stevens v. Marks* it is clear that plaintiffs have the right to this protection as a condition to their waiver of the privilege and submission to discovery. Nor, as has been shown in argument II above, with Shell be prejudiced by this order. Indeed, they will, in all probability, enjoy more effective discovery.

In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), the Supreme Court invalidated a portion of a Congressional Act which provided for an automatic waiver of the privilege against self-incrimination. The Court ruled that such an automatic waiver should not be recognized unless it "supplies a complete protection from all the perils against which the constitutional prohibition was designed to guard . . . by affording absolute immunity against future prosecution. . . ." (at page 80). Thus, if defendant desires plaintiffs to waive their privilege as a condition to going forward with this civil litigation, the minimum protection to which the plaintiffs are entitled is the shelter of the requested protective order.

No discussion of the value of the privilege against self-incrimination or the reluctance of courts to find a waiver of that privilege would be complete without mention of the celebrated case of *Miranda v. Arizona*, *supra*. There, as here, prosecuting officials were attempting to obtain pre-trial incriminating statements from one suspected to be implicated in criminal activity. In *Miranda* the Court recognized the privilege as "one of our Nation's most

cherished principles''. (at pages 457-458). Perhaps more important to our present case is the Court's following statement:

"We have recently noted that the privilege against self-incrimination—*the essential mainstay of our adversary system*—is founded on a complex of values. . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens. . . . [T]o respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, *rather than by the cruel, simple expedient of compelling it from his own mouth*". (at page 460) (Emphasis added)

What the *Miranda* court stated concerning the evils of incommunicado interrogation is equally applicable to the apparent conspiracy (between the Government and Shell) to circumvent the plaintiffs' constitutional privilege in the present case. Both have the effect of providing information to prosecuting officials which they are not entitled to. In *Miranda* the prosecuting officials used secrecy—here they use a legal technicality which coerces their victims to submit a wealth of detailed information. In either case, even if the accused waives his privilege, he may re-assert it at any subsequent time. Indeed, a "heavy burden rests on the Government to demonstrate that the accused knowingly and intelligently waived his privilege". The Supreme Court has always set high and rigorous standards for proof of waiver of constitutional rights. *Miranda v. Arizona*, 384 U.S. at 475; *Johnson v. Zerbst*, 304 U.S. 458

(1938). Again we can look to *Stevens v. Marks, supra*, and to Judge Koelch's opinion in the *Hashagen* case for relevant insight into the solution of the problem here presented: Even though assertion of the privilege obstructs the conduct of a proceeding,

“ ‘waiver of Constitutional rights is not lightly to be inferred’; a necessary corollary is that *the doctrine of waiver should be confined in its operation to narrow limits* and charily applied else the Constitutional guarantee would be effectively nullified by a mere expedient.” 283 F.2d at p. 353. (Emphasis added.)

These cases, then, clearly demonstrate that the mere filing of a civil suit for damages by plaintiffs does not automatically divest them of their constitutional privilege against self-incrimination. Indeed, such a waiver cannot be found by this Court unless it supplants the protection of the privilege by providing an immunity at least as broad as the requested protective orders.

IV. TO COMPEL PLAINTIFFS TO CHOOSE BETWEEN THEIR RIGHT TO REMAIN SILENT AND THEIR RIGHT TO PROSECUTE THE CIVIL ANTITRUST SUIT HEREIN UNJUSTIFIABLY CONDITIONS THEIR CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION IN VIOLATION OF THE FIFTH AMENDMENT.

Shell contends that even though plaintiffs may not have irrevocably waived their privilege, nevertheless assertion of the privilege is inconsistent with the pressing of the present civil antitrust action. Therefore, Shell would require the plaintiffs to make an election between invoking the privilege *or* carrying on with the civil suit. Such an argument is untenable and anachronistic in its failure to

recognize and understand the flood of recent decisions by the United States Supreme Court which have elevated the protection of the privilege to a near absolute constitutional status. *Malloy v. Hogan*, *supra*; *Miranda v. Arizona*, *supra*; *Albertson v. Subversive Activities Control Board*, *supra*; *Spevack v. Klein*, *supra* (and other cases too numerous to cite).

Shell's argument, and its citation of *Independent Prod. Corp. v. Loew's*, 22 F.R.D. 266 (S.D.N.Y. 1958), reflects the rationale of the Supreme Court's decision in *Lerner v. Casey*, 357 U.S. 468 (1958), where a public employee was dismissed because, by asserting his right to silence, he failed to carry the burden of proving his loyalty and moral fitness—conditions of employment. *Lerner* is distinguishable from our own case, and the underlying reasoning behind this distinction paves the way for a decision in plaintiffs' favor on the motions herein involved. Our case is not like *Lerner*, *Independent Prod. Corp.*, or the numerous other decisions wherein an individual's assertion of the privilege against self-incrimination directly conflicted with a duty independently owed by the invoking party. *Beilan v. Bd. of Education*, 357 U.S. 399 (1958). The defendant would like to convince this Court that such a conflict does exist here; that should plaintiffs invoke the privilege, such would constitute a breach of their duty to cooperate in the discovery process. In point of fact, it is really Shell who, by its unrealistic position in opposing the issuance of the protective order, is causing this dilemma to be created. Indeed, if the Court grants the protective orders, the *Lerner* dilemma will be averted; plaintiffs will be able to fully cooperate with Shell's discovery requests, and at the same time be fully

(1938). Again we can look to *Stevens v. Marks, supra*, and to Judge Koelch's opinion in the *Hashagen* case for relevant insight into the solution of the problem here presented: Even though assertion of the privilege obstructs the conduct of a proceeding,

“ ‘waiver of Constitutional rights is not lightly to be inferred’; a necessary corollary is that *the doctrine of waiver should be confined in its operation to narrow limits* and charily applied else the Constitutional guarantee would be effectively nullified by a mere expedient.” 283 F.2d at p. 353. (Emphasis added.)

These cases, then, clearly demonstrate that the mere filing of a civil suit for damages by plaintiffs does not automatically divest them of their constitutional privilege against self-incrimination. Indeed, such a waiver cannot be found by this Court unless it supplants the protection of the privilege by providing an immunity at least as broad as the requested protective orders.

IV. TO COMPEL PLAINTIFFS TO CHOOSE BETWEEN THEIR RIGHT TO REMAIN SILENT AND THEIR RIGHT TO PROSECUTE THE CIVIL ANTITRUST SUIT HEREIN UNJUSTIFIABLY CONDITIONS THEIR CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION IN VIOLATION OF THE FIFTH AMENDMENT.

Shell contends that even though plaintiffs may not have irrevocably waived their privilege, nevertheless assertion of the privilege is inconsistent with the pressing of the present civil antitrust action. Therefore, Shell would require the plaintiffs to make an election between invoking the privilege *or* carrying on with the civil suit. Such an argument is untenable and anachronistic in its failure to

recognize and understand the flood of recent decisions by the United States Supreme Court which have elevated the protection of the privilege to a near absolute constitutional status. *Malloy v. Hogan, supra*; *Miranda v. Arizona, supra*; *Albertson v. Subversive Activities Control Board, supra*; *Spevack v. Klein, supra* (and other cases too numerous to cite).

Shell's argument, and its citation of *Independent Prod. Corp. v. Loew's*, 22 F.R.D. 266 (S.D.N.Y. 1958), reflects the rationale of the Supreme Court's decision in *Lerner v. Casey*, 357 U.S. 468 (1958), where a public employee was dismissed because, by asserting his right to silence, he failed to carry the burden of proving his loyalty and moral fitness—conditions of employment. *Lerner* is distinguishable from our own case, and the underlying reasoning behind this distinction paves the way for a decision in plaintiffs' favor on the motions herein involved. Our case is not like *Lerner*, *Independent Prod. Corp.*, or the numerous other decisions wherein an individual's assertion of the privilege against self-incrimination directly conflicted with a duty independently owed by the invoking party. *Beilan v. Bd. of Education*, 357 U.S. 399 (1958). The defendant would like to convince this Court that such a conflict does exist here; that should plaintiffs invoke the privilege, such would constitute a breach of their duty to cooperate in the discovery process. In point of fact, it is really Shell who, by its unrealistic position in opposing the issuance of the protective order, is causing this dilemma to be created. Indeed, if the Court grants the protective orders, the *Lerner* dilemma will be averted; plaintiffs will be able to fully cooperate with Shell's discovery requests, and at the same time be fully

protected from the danger of having the Government use these disclosures to improperly circumvent the plaintiffs' Fifth Amendment immunity. We reiterate—plaintiffs are not attempting to block proper discovery (as was the case in *Lerner* and in *Independent Prod. Corp.*)—they are merely seeking to prevent the discovered facts from being improperly used by the Government in a criminal action.

Indeed, in the *Independent Prod. Corp. v. Loew's* case, the issue primarily concerned plaintiff's alleged absolute First Amendment right to remain silent. The plaintiff's assertion of the Fifth Amendment privilege against self-incrimination and related request for a protective order were improperly raised and thus not considered by the court. In a subsequent appellate review of the *Independent Prod. Corp.* case, the Second Circuit Court of Appeals ruled that the trial court abused its discretion in dismissing the complaint because of plaintiff's assertion of his Constitutional privilege against self-incrimination in refusing to submit to unprotected discovery. 283 F.2d 730 (2nd Cir. 1960). If plaintiffs here are unsuccessful in obtaining protective orders the doors will be open for numerous Governmental attempts to avoid the restrictive rules of *criminal* discovery, by improper utilization of the fruits of *civil* discovery, thereby treading with impunity upon criminal defendants' valuable privilege against self-incrimination. This Court, in recognizing the paramount policies of the constitutional immunity, must rule in favor of the plaintiffs herein.

The defendant's contention that plaintiffs must choose between their right to petition a court for civil relief or their constitutional right to silence must also fail on the authority of the United States Supreme Court's decisions

in *Slochower v. Bd. of Education*, *supra*, and *Spevack v. Klein*, *supra*.

In *Slochower*, a school teacher was dismissed because of his assertion of the Fifth Amendment. The Supreme Court reversed, ruling that Slochower's assertion of the privilege was not a proper basis for dismissal. The same reasoning should lead this Court to rule that plaintiffs need not be forced to choose between the right to bring a civil suit and the right to remain silent. Compelling such an "election" usually reflects the official belief that individuals who invoke the privilege against self-incrimination are probably guilty of some illegality. But as Mr. Justice Clark stated in *Slochower*, "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances". If this Court refuses the plaintiffs' motion, Shell and the Government will most certainly attempt to "ensnare" plaintiffs in a web of "ambiguous circumstances". Where, as here, plaintiffs are forced to choose "between the rock and the whirlpool, duress is inherent in deciding to 'waive' one or the other". This Court must not sanction such "a watered-down version of constitutional rights". *Garrity v. New Jersey*, 87 S.Ct. at pp. 619-620.

The plaintiffs, in filing their private antitrust suit, are pursuing an activity guaranteed to all citizens of the United States by our Constitution—the right to access to the federal courts for redress of private wrongs. *Crandall v. Nevada*, 73 U.S. 35 (1867). Moreover, in pursuing this private treble damage antitrust claim the plaintiffs

are fulfilling an important component of the public interest in "vigilant enforcement of the antitrust laws". *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955). These considerations would seem to prohibit dismissal of plaintiffs' action except under extreme circumstances not present in our case. *Independent Prod. Corp. v. Loew's*, 283 F.2d 730 (2nd Cir. 1960).

The most recent and most significant case prohibiting the practice (here urged by Shell) of forcing individuals to choose between their right to silence or a civil proprietary right (such as the right to employment, the right to practice law or the right to bring a civil suit) is *Spevack v. Klein*, *supra*. In *Spevack*, a 1967 decision, the United States Supreme Court ruled that a private citizen's privilege against self-incrimination is unconstitutionally abridged in instances where he is coerced into choosing between waiver of the privilege or loss of an alternative proprietary right. As Mr. Justice Douglas stated:

"... the Self-Incrimination Clause . . . should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it. . . .

"... The Fifth Amendment guarantees . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence. (Citing *Malloy v. Hogan*, *supra*.)

"In this context, 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of *any* sanction which makes assertion of the Fifth Amendment privilege 'costly'." *Spevack v. Klein*, 87 S.Ct. at pp. 627-628. (Emphasis added.)

To condition plaintiffs' right to invoke silence by compelling them to cease pressing their civil claim would clearly constitute the imposition of a "sanction" designed to make assertion of the privilege extremely "costly". Such a practice would be violative of the Fifth Amendment.

In a companion case, *Garrity v. New Jersey*, 385 U.S. 511 (1967), the Supreme Court condemned the practice of using the denial of a quasi-proprietary right as a "club" to coerce an individual into giving information which could be used against him in a related collateral criminal proceeding. The Court viewed "the choice between self-incrimination or job forfeiture" as an unconstitutional "form of compulsion". *Garrity v. New Jersey, supra*.

In reading the principles of *Spevack*, *Garrity*, *Slochow*, *Stevens v. Marks, supra*, and *Albertson*, into Rule 30(b) and our own factual situation—it becomes clear that plaintiffs' motion for a protective order must be granted. The plaintiffs have the right to bring the present civil antitrust action; the defendant has the right to conduct discovery. Inasmuch as Shell and the Government are working on a common issue as against the plaintiffs (and especially in light of Shell's willingness to cooperate with the Government here), the plaintiffs have the constitutional right to object to submitting to such discovery.

Shell's contention that plaintiffs have waived their privilege must clearly fail on the reasoning of *Stevens v. Marks, supra*, and *Albertson v. Subversive Activities Control Board, supra*. Shell's contention that plaintiffs must

then choose between asserting their privilege and further prosecuting their civil suit is equally untenable. As recognized in *Spevack*, *Garrity*, and *Slochower*, the privilege against self-incrimination is far too valuable a liberty to be subjected to this type of technical "blackmail". The Supreme Court has condemned as unconstitutional practices which indirectly coerce such losses or "waivers" of the right to silence. To place the plaintiffs in such an *unnecessary* dilemma in the present case would result in a violation of the Fifth Amendment to the Constitution of the United States.

V. CONCLUSION

The Court in the present case has the opportunity to easily avoid a significant constitutional issue. By applying the cherished principles underlying the privilege against self-incrimination to the dictates of Rule 30 (b), this Court would be encouraging the District Court to wisely exercise its equitable and discretionary powers.

If the protective orders are granted, the civil suit could proceed, defendant could engage in discovery, and plaintiffs would be protected from having their admissions improperly used as evidence or investigatory leads in the criminal action pending against them. *Albertson v. Subversive Activities Control Board*, *supra*.

On the other hand, if plaintiffs' motion is denied, this Court will be creating a situation which is most perilous to the plaintiffs' liberties as guaranteed by the Fifth Amendment. In the final analysis, the granting of the motion for a protective order is the only available alternative which is consistent with all of the competing

constitutional, legislative, and procedural policies here involved. Rule 30(b) must be utilized to keep criminal discovery within proper and reasonable bounds.

Dated, San Francisco, California,
January 16, 1968.

Respectfully submitted,

JOSEPH L. ALIOTO,

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Of Counsel.

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MAXWELL M. BLECHER.

(Appendices A, B, C and D Follow)

Appendices A, B, C and D



Appendix A

Department of Justice
450 Golden Gate Avenue — Room 16432
Box 36046
San Francisco, California 94102

Air Mail

July 31, 1967

William Simon, Esq.
Howrey, Simon, Baker & Murchison
1707 H Street, Northwest
Washington, D. C. 20006

Dear Mr. Simon:

It would be appreciated if you could furnish us with copies of all depositions taken by you in *Russell L. Jones, et al. v. Shell Oil Company*, Civ. 47261.

United States v. California Shell Dealers Association, Cr. 41348, has been given a trial date of October 23, 1967. It may be of interest to you that on July 28, at the request of Mr. Alioto's firm which represents the defendants, we signed a stipulation that all proceedings in this case were to be taken off calendar pending a decision by the Fifth Circuit Court of Appeals in two cases interpreting Criminal Rule 16(a)(3).

Thank you for your cooperation.

Sincerely yours,

Edwin M. Zimmerman
Acting Assistant Attorney General
Antitrust Division
/s/ Lyle L. Jones
Lyle L. Jones
Chief, San Francisco Office

Appendix B

In the United States District Court
for the Northern District of California

No. 47261

Russell L. Jones, et al.,

Plaintiffs,

vs.

Shell Oil Company,

Defendant.

Protective Order Pursuant
to Rule 30(b) of the
Federal Rules of Civil Procedure

Plaintiffs, having moved for protective order pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, the issue having been fully briefed, and after oral argument, the Court being fully advised in the premises,

It Is Hereby Ordered that the examination of the plaintiffs by deposition shall be held with no one present except the parties to the action and their officers or counsel.

It Is Further Ordered that all transcripts, transcribers' notes or other form of record of the examination of the plaintiffs by deposition and all of the information contained therein shall be retained by the parties, their

counsel and the transcriber, and shall be used by them solely in the preparation for trial or in the trial of this action; and that said record and information shall not be disclosed to the operating personnel of the defendant or to any third parties; and at the termination of this action the defendant and the transcriber shall return to the plaintiffs all of the above described materials.

It Is Further Ordered that the transcripts of the examination of the plaintiffs by deposition shall be placed under seal and shall be so filed with the Court and shall be opened only by order of the Court.

Dated: October 12, 1967.

Stanley A. Weigel
Judge

Appendix C

Written Interrogatories, Set Number One, to the Plaintiffs

* * * *

... 5. (a) State for each day during the relevant time period the net price at which you sold each grade of gasoline, (b) the date of each change in your price, (c) the new price charged to you after each such change, and (d) your gross margin of profit (difference between net cost and selling price) per gallon at each such selling price.

* * * *

12. (a) Did you at any time during the relevant period offer to any of your customers trading stamps, premiums, contests, give-aways, or any other type promotion; and (b) if your answer is in the affirmative,

(i) describe each such activity and give the dates during which each such promotion was in effect;

(ii) describe the terms and conditions on which you offered each such promotion (*e.g.*, one trading stamp per 10¢ purchase);

(iii) give the cost to you of each such activity both in cost per unit and in total monthly cost during the time each such promotion was in effect; and

(iv) state to what extent, if any, your gasoline supplier participated in the cost of each such promotion.

13. State whether, at any time during the relevant period, you did not display or utilize price signs at your

station (not including price data on the pumps); and if so, the dates during which you did not have such price signs.

14. State the size, type, location and number of all price signs you did display or utilize during the relevant time period, and the dates or time periods when each such price signs were so utilized by you.

* * * *

18. (a) Give the name of each group or association of dealers of which you were a member at any time during the relevant period; and (b) as to each such group or association state:

(i) the period of time you were a member,

(ii) any position or office held by you, the time during which you held such office, and your duties connected therewith,

(iii) the names, addresses, and time period of all officers,

(iv) the date and location of each meeting of which you have knowledge, and whether attended by you,

(v) the amount of dues paid annually by you,

(vi) whether there were any special assessments to which you contributed, the purpose, date of payment and the amount therefor, and

(vii) whether you participated in any form of activity or project conducted, sponsored, or supported by the association, and, if so, (1) the date thereof, (2) the names of the persons participating therein with you, (3) the nature of your participation, (4) the person or per-

sons who organized the activity, and (5) the purposes of the activity.

19. (a) List and describe each record, writing or document (i) received by you from, or (ii) to your knowledge transmitted or distributed to anyone by, during the relevant period, any group association listed in response to Interrogatory No. 18; and (b) state (i) the date of such writing, (ii) by whom sent, (iii) to whom sent, (iv) the general subject matter thereof, and (v) the current location thereof.

20. (a) Are you a co-conspirator as alleged in the complaint with whom Shell is alleged to have entered into the agreements with retailers described in the complaint; and (b) name every other such co-conspirator known to you.

Dated: July 10, 1967.

Appendix D

United States District Court
Northern District of California

Civil Action No. 47261

Russell L. Jones, et al.,	} Plaintiffs,
vs.	
Shell Oil Company,	
	} Defendant.

Order

This cause coming on for hearing on the motion of the plaintiffs, Russell L. Jones, et al., for an order that plaintiffs' answers to Shell Oil Company's Interrogatories 5, 12, 13, 14, 18, 19, 20 and 21, First Set, be filed under seal and that said answers be kept in confidence, and the Court having heard arguments of counsel and being fully advised in the premises.

It Is Ordered that the foregoing motion of the plaintiffs be and the same is hereby denied.

Approved as to form

Keith E. Pugh, Jr.

Attorney for the Plaintiffs

Entered:

/s/ William T. Sweigert

United States District Judge

Date: November 20, 1967

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHELL OIL COMPANY, *Appellant*

v.

RUSSELL L. JONES, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22441

SHELL OIL COMPANY, *Appellant*

v.

RUSSELL L. JONES, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

JURISDICTION

This is an appeal from an order of the United States Court for the Northern District of California entered on October 12, 1967 (R. 152-153) which granted plaintiffs' Motion for a Protective Order Pursuant to Rule 30(b) of the Federal Rules of Civil Procedure (R. 56).

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 15. A Notice of Appeal was filed by Appellants on November 1, 1967 (R. 154). This Court has jurisdiction to review the order based on 28 U.S.C. § 1291 and the All Writs Act 28 U.S.C. § 1651(a).

STATEMENT OF THE CASE

This is a private antitrust action initiated after the filing of an indictment charging four individuals¹ and three trade associations² with having violated the Sherman Act by engaging in a horizontal conspiracy to fix the price of gasoline sold at service stations (*United States v. California Shell Dealers Association, Inc.*, Criminal No. 41348 (N.D. Cal. filed April 26, 1967)).³

Two months *after* this indictment was returned, 72 present and former dealers of Shell Oil Company (Shell), including 3 of the individuals named as defendants in the antitrust indictment,⁴ filed this civil complaint on behalf of themselves and all other Shell dealers similarly situated (R. 1-11). The complaint alleges that each of the plaintiffs is a member of one or more of the indicted trade associa-

¹ John A. Mullins, Joseph Chandler, John Macchitelli and Earl C. Schweizer.

² California Shell Dealers Association, Inc., Southern Alameda County Retail Petroleum Dealers Association and Santa Clara County Shell Dealers Association.

³ The Indictment, a copy of which is included in the record (R. 75-82), charged the defendants with conspiring:

(a) To raise, fix, establish and maintain the price of gasoline sold in service stations.

(b) To raise, fix, establish and maintain margins.

(c) To eliminate the giving of trading stamps.

(d) To eliminate the posting of price signs.

(e) To harass and annoy service stations which continue to give trading stamps or post price signs.

⁴ John A. Mullins, Joseph Chandler and Earl C. Schweizer.

tions and charges, *inter alia*, that Shell “coerced Shell dealers both directly and indirectly to follow prices set by Shell” and that Shell maintained “control over all aspects of retail outlets operated by its dealers” through its alleged “domination and control over the dealers” (R. 6, 9).

Plaintiffs urged below that this complaint was “precipitated by the fact that they felt that they had been unjustifiably indicted by the Government” (Tr. 21, and see Tr. 10).⁵ As Judge Weigel stated, “they came back and said that the Government was after the wrong party, the Government was going for the cylinders instead of wheels, and they filed suit” (Tr. 20).

After the complaint in this action was filed, Shell noticed the taking of depositions of the Plaintiffs. (R. 12-15)⁶ Thereafter Shell filed its answer alleging, as an affirmative defense, that the Plaintiffs’ right to recover damages, or any other relief, is barred by the Plaintiffs’ participation in a conspiracy to restrain trade in the sale of gasoline in California. Shell also filed a counterclaim based on like allegations. (R. 7, 11-19).

On July 25, 1967 Shell commenced the taking of the Plaintiffs’ depositions and Mr. Richard Gray, the first Plaintiff deposed, testified, *inter alia*, that he had been a witness before the grand jury which returned the indictment against *California Shell Dealers Association, Inc., et al.*⁷

Thereafter, Plaintiffs filed a motion pursuant to Rule 30(b) of the Federal Rules of Civil Procedure seeking to

⁵ “Tr. —” refers to the transcript of the hearing before Judge Weigel which was filed as part of the record on appeal.

⁶ Many of the 72 Plaintiffs have subsequently been dismissed as parties to this action (See *e.g.* R. 150-151). At the time the Notice of Appeal was filed there were 57 individuals remaining as Plaintiffs to this lawsuit. At present only 42 individuals remain as plaintiffs to this lawsuit.

⁷ See Appendix B.

seal the depositions of Plaintiffs (R. 56). Plaintiffs claimed, "The basic problem to which this motion is addressed is that the United States Government in its criminal action against plaintiffs⁸ is not entitled to the pre-trial discovery available in the treble damage cases under the Federal Rules of Civil Procedure" (R. 63).

A hearing on plaintiffs' motion was held before Judge Stanley A. Weigel on September 18, 1967. At that hearing Judge Weigel summarized the issues involved in appellees' motion for a Protective Order.

We have a problem, regardless of who it is, that a party comes into the United States District Court—parties—and say they want damages against someone else. Having done that, counter-claim was invited. Having done that, I wonder if this Court is acting altogether in good conscience if this Court said, "All testimony has got to be in secret to protect plaintiffs against criminal action."

I am uncomfortable about such an order. I am uncomfortable about such an order despite the fact that the bench [memorandum] before me suggests there are good reasons for it. I don't like that kind of an order (Tr. 14).

Judge Weigel, however, asked for further briefs by the parties and invited the Government to file a brief *amicus curiae* (Tr. 29-30). After these briefs had been submitted, Judge Weigel, on October 12, 1967, entered an order sealing the depositions of the plaintiffs. In addition, Judge Weigel's order required that, at the termination of the action, Shell turn over all transcripts of the examination of Plaintiffs by deposition to the Plaintiffs; that the depositions take place with no one present except the parties, their officers or counsel; and that the transcript of the deposition and the information contained therein

⁸ It should be noted that only 3 of the Plaintiffs in this action are under indictment (see p. 2, *supra*).

not be disclosed to the operating personnel of the defendant or to any third parties (R. 152-153). We estimate the transcripts ordered to be turned over to Plaintiffs will cost Shell well in excess of \$25,000.

On October 30, 1967 Shell appealed from this order (R. 154). On November 3, 1967 Shell was served with Plaintiffs' (Appellees') *Motion to Docket and Dismiss Appeal* and on November 8, 1967 Shell filed a motion asking that this Court postpone any action on appellees' Motion to Dismiss until full briefing on the merits.

After Judge Weigel entered the protective order, Plaintiffs sought an order which would have similarly sealed their answers to certain of defendant's interrogatories. Plaintiffs' *Memorandum of Points and Authorities* in support of their motion stated only that:

Plaintiffs request that their answers to certain of the defendant's interrogatories be placed under seal in the same manner and for the same reasons that the Honorable Stanley A. Weigel ordered the depositions of the same plaintiffs be placed under seal (Protective Order Pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, filed on October 12, 1967). Plaintiffs incorporate by reference in full their Brief in Support of Plaintiff's Motion for a Protective Order Pursuant to Rule 30(b) and Rule 33 (insofar as it incorporates Rule 30(b)) and the letter of October 6, 1967 from Keith E. Pugh, Jr. to the Honorable Stanley A. Weigel, copies of which were sent to all counsel of record.

On November 20, 1967, Judge Sweigert ruled from the bench that he would deny plaintiffs' motion seeking to place their answers to certain of defendant's interrogatories under seal. Judge Sweigert apparently felt that the critical fact was that it was the *plaintiffs*, who had initiated the litigation, who were seeking to seal the pre-trial proceedings (App., pp. 25-27).⁹

⁹ The transcript of the hearing before Judge Sweigert is attached as an Appendix to this brief at pp. 25-27, *infra*.

Shell filed with this Court a copy of the transcript of the hearing before Judge Sweigert.¹⁰ This Court has entered an order that the Appellees' Motion to Dismiss be passed for consideration to the hearing of the case on the merits.

On December 13, 1967 Shell was served with Plaintiffs' Notice of Appeal from Judge Sweigert's order. In addition, Plaintiffs filed with this Court a motion to docket their appeal and requested that the Court consider Plaintiffs' appeal in connection with Shell's appeal from Judge Weigel's order.

SPECIFICATION OF ERROR

The district court erred in entering the Protective Order Pursuant to Rule 30(b) of the Federal Rules of Civil Procedure.

ARGUMENT

- I. THE ORDER BELOW WHICH PROHIBITS SHELL FROM DISCLOSING THE INFORMATION CONTAINED IN THE TRANSCRIPTS OF ITS EXAMINATION OF PLAINTIFFS BY DEPOSITION TO ANY OF ITS OPERATING PERSONNEL OR OTHER THIRD PARTIES, AND WHICH REQUIRES SHELL TO TURN OVER TO PLAINTIFFS, AT THE TERMINATION OF THIS LITIGATION, ALL COPIES OF SUCH TRANSCRIPTS IN ITS POSSESSION CONSTITUTES AN ABUSE OF DISCRETION**

The issue presented in this appeal, and upon which two judges below split, is whether the 42 remaining plaintiffs who filed this civil antitrust suit two months *after* the indictment involved was returned, are entitled to a protective order under Rule 30(b) in order to protect the asserted rights of the defendants to the criminal indictment, three of whom are parties to this suit. Resolution of the questions of the propriety of Judge Weigel's order and whether he abused his discretion turns, we submit, on two critical facts. First, that it is the plaintiffs, who voluntarily initiated this action after the indictments had

¹⁰ See Supplemental Memorandum filed by Shell in this Court.

been returned, who are seeking to have the depositions sealed and second, that only three of the plaintiffs had been named as defendants in the criminal antitrust suit.

Under the Federal Rules of Civil Procedure all proceedings of a court, including depositions, are normally open to the public. Rule 30(f)(1) of the Federal Rules of Civil Procedure provides that the officer before whom a deposition is taken must file the transcript with the clerk of the court and, of course, all court records are normally open to the public. As this Court has pointed out in *Olympic Refining Co. v. Carter*, 332 F. 2d 260, 264 (C.A. 9 1964):

In the federal judicial system trial and *pretrial proceedings* are ordinarily to be conducted in public. Rule 43(a), Federal Rules of Civil Procedure, provides that in all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided in the rules (emphasis supplied).

It is only in the unusual situation that a court will order the sealing of depositions. *Pearson v. McCarthy*, 16 F.R. Serv. 30b.342 (D.C.D.C. 1951).

The policy of keeping all pre-trial proceedings open to the public is particularly strong in the field of antitrust litigation. The Publicity in Taking Evidence Act, 37 Stat. 731 (1913); 15 U.S.C. § 30, provides that in Government antitrust litigation, "In the taking of depositions . . . the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable." This Court has recognized that the policy of that Act extends beyond its express terms, *Olympic Refining Co. v. Carter*, *supra*. As this Court recognized in that case, the purpose of the Act is to make available to potential treble-damage plaintiffs evidence of any alleged violations of the Sherman Act for "Private treble-damage actions are an important component of the

public interest in 'vigilant enforcement of the antitrust law.' *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329'' (*Olympic Refining, supra*, at p. 264).

In view of this strong public policy of keeping pre-trial proceedings—particularly in antitrust litigation—open to the public, it is clear that there are no unusual circumstances warranting the entry of an order sealing all the transcripts of the depositions of the Plaintiffs and directing Shell to turn over all of the transcripts of such depositions in their possession to Plaintiffs at the termination of this litigation.

Although orders staying the taking of depositions¹¹ or sealing depositions¹² have been granted in some instances where the defendants in a civil suit were also defendants in a criminal action covering the same subject matter, Plaintiffs have not pointed to one case where such an order was granted upon motion of a criminal defendant who voluntarily subjects himself to the discovery procedures of the Federal Rules by initiating a civil action after the return of an indictment. Whatever public policy may justify a sealing order pursuant to 30(b) upon the motion of a defendant to concurrent civil and criminal actions, who is thus involuntarily before the Court, this policy has no applicability to the case of a criminal defendant who voluntarily initiates a civil lawsuit, and certainly has no applicability to those Plaintiffs whose only connection with the prior criminal case is that they are members of the indicted trade associations.

Plaintiffs below attempted to justify a sealing order on the ground "that the United States Government in its criminal action presently pending against plaintiffs is not

¹¹ See e.g. *Perry v. McGuire*, 36 F.R.D. 272 (S.D.N.Y. 1964); *Harrigan & Sons v. Enterprise Animal Oil Co.*, 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp. v. Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952).

¹² *D'Ippolito v. American Oil Co.*, 272 F. Supp. 310 (S.D.N.Y. 1967).

entitled to the pre-trial discovery available . . . under the Federal Rules of Civil Procedure" (R. 4). But it is not the Government which is conducting this pre-trial discovery. As the Second Circuit has recently stated in somewhat similar circumstances, "The fact that additional testimony thereby becomes available to the government is merely the natural byproduct of another judicial proceeding; and to that extent it might be 'discovery,' but it is not discovery which the government has initiated or promoted for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right of the appellees." *United States v. Simon*, 373 F. 2d 649, 652 (C.A. 2 1967); *certiorari granted, sub nom. Simon v. Wharton*, 386 U.S. 1030 (1967).

In this case four individuals and three trade associations were indicted for engaging in a horizontal price fixing conspiracy. Within two months three of these individual defendants joined together with 69 other Shell dealers, 30 of whom have subsequently withdrawn from the suit, and brought a civil treble-damage action against Shell charging that Shell had "coerced Shell dealers directly and indirectly to follow the prices set by Shell . . ." and "[maintained] control over all aspects of retail outlets operated by its dealers" (R. 9). Plaintiffs concede that this action was precipitated by the Government's indictment and that they brought this suit to vindicate themselves (Tr. 20-21). This should be apparent since the complaint charges that Shell has "fixed their retail prices against their will" since 1960 (Tr. 20, R. 6, 9), yet this action was not commenced until after the indictment issued.

Plaintiffs are attempting to use the District Court as both "a sword and a shield." *Independent Productions Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 277 (S.D.N.Y. 1958). They are seeking to use this action as a sword to vindicate the defendants in the criminal case and as a shield to prevent the public from learning of any wrongdoing on

their part. Of course, if evidence were developed by plaintiffs in this action to support their charge that Shell coerced them to follow prices set by it this would be useful to the defendants in the criminal case.

In a somewhat analogous situation, where a corporation had initiated a private treble-damage action and its president then refused to answer questions during deposition on the grounds of a testimonial privilege, the Court held that even if a testimonial privilege existed it would be compelled to find a waiver. *Independent Productions Corp. v. Loew's, Inc.*, *supra*, at pp. 276-279. As that court stated:

Plain justice dictates the view that, regardless of plaintiffs' intention, plaintiffs must be deemed to have waived their assumed privilege by bringing this action (22 F.R.D. 276).

. . . *Plaintiffs in this civil action have initiated the action and forced defendants into court. If plaintiffs had not brought the action, they would not have been called on to testify. Even now, plaintiffs need not testify if they discontinue the action. They have freedom and reasonable choice of action. They cannot use this asserted privilege as both a sword and a shield (Id. at 277, emphasis added).*

Similarly, in *Henrik Mannerfrid, Inc. v. Teegarden*, 23 F.R.D. 173, (S.D.N.Y. 1959), where the plaintiff refused to answer interrogatories because it claimed the informer's privilege, the Court ruled:

Fairness to the opposition may require plaintiff to forego the protection that the law will ordinarily afford to one who has not instituted a lawsuit (*Id.* at 177).

And see, *Awtry v. United States*, 27 F.R.D. 399, 402 (S.D.N.Y. 1961) (" . . . plaintiff may not continue this action and at the same time deny to defendant the right to avail itself of the pre-trial procedures necessary to

prepare its defense''); and, *Fleming v. Bernardi*, 1 F.R.D. 624 (N.D. Ohio 1941). Similarly here, Plaintiffs should not be permitted, as the order below would permit them, to initiate a lawsuit and then seriously prejudice defendant's right to conduct pretrial discovery and prepare its defense.

Shell will be prevented from adequately preparing its defense because, although Judge Weigel's order permits Shell to use the transcripts of Plaintiffs' depositions "in the preparation for trial," it specifically prohibits Shell from showing any of these transcripts or disclosing any information contained in them to any of its operating personnel or any other third parties (R. 152). Thus Shell is precluded from showing these transcripts to prospective witnesses. But Shell must be able to review Plaintiff's testimony in deposition with prospective witnesses if it is to prepare its defense.

For example, Plaintiffs, all of whom are, or were, Shell dealers, have charged Shell with coercing them to follow prices set by Shell and with controlling many business aspects of retail outlets operated by its dealers "through a system of policing which subjects the dealer to inspection, surveillance and harassment by Shell's *dealer representatives* and others" (R. 6, emphasis supplied). Thus, one of the critical charges against which Shell must defend itself is whether or not its "dealer representatives" did engage in a system of policing which subjected the plaintiffs to "inspection, surveillance and harassment." In order to prepare a meaningful defense to this charge Shell must be able to confer with its dealer representatives and other operating personnel and review with them Plaintiffs' deposition testimony dealing with this subject. Similarly, Shell must review Plaintiffs' testimony with its operating personnel in order to develop the facts relating to its affirmative defense that Plaintiffs have engaged in a horizontal price fixing conspiracy. Shell's operating personnel in the San Francisco area are

the most knowledgeable people in the Shell organization with regard to the subject of the pricing, and other activities of the Plaintiffs.

Moreover, a number of the Plaintiffs have already been deposed and Shell has reason to doubt the credibility and veracity of some plaintiffs' testimony. In this regard, Shell has reason to believe that others were present at meetings and invited to join the conspiracy and that still others were threatened that they would be "picketed" and harassed unless they joined the conspiracy and agreed that they would not post price signs. Shell must talk to these other Shell dealers, including those 30 Plaintiffs who have dropped out of this suit, and review Plaintiffs' depositions with them. These people would have direct and personal knowledge of the matters testified to by Plaintiffs. Yet under Judge Weigel's order Shell may not discuss Plaintiffs' testimony with these people or anyone else who might be able to shed light on these matters.¹³ Indeed it is doubtful, under Judge Weigel's order, whether Shell could even show the transcripts to other non-party witnesses during their examination by deposition.

Finally, Plaintiffs purport to bring this suit as a class action "on their own behalf and on behalf of all Shell Oil Company dealers in the counties of Alameda, Santa Clara, San Mateo, Contra Costa, Marin and San Francisco, and the Sacramento-Auburn-Roseville area, . . . pursuant to Rule 23 of the Federal Rules of Civil Procedure . . ." (R. 2). The District Court has not yet ruled on the propriety of the class action. If it should hold this to be a proper class action, Rule 23(c)(2) provides that any

¹³ Judge Weigel's order would also prevent Shell from bringing to the United States attorney's attention any instance of what it believes to be perjurious testimony in Plaintiffs' depositions. In effect, Plaintiffs would be immunized from any possibility of prosecution for any perjury they might commit during the depositions. On the other hand, if Plaintiffs know that their testimony may be scrutinized by the United States attorney they are much more likely to be careful to answer any question put to them fully and truthfully.

member of the class may request that the Court exclude him from the suit. Under the new Rule 23 all members of the class are bound by the judgment for or against the named parties—unless they elect to be excluded. After being informed as to the nature of this suit, many members of the class on whose behalf this action was brought may decide that they do not wish to be parties to this action. Shell believes it should have the right to inform the members of the class what plaintiffs have testified to in deposition so that they may make an informed judgment as to whether they wish to be bound by the Plaintiffs' conduct in this action.¹⁴

Even assuming, *arguendo*, there was some justification for sealing the depositions of the Plaintiffs Mullins, Macchitelli and Schweitzer because they are defendants in a criminal case, no such rationale would extend to the other 39 Plaintiffs remaining in the case. These other 39 Plaintiffs are not defendants in the Government's criminal suit. They are not seeking to have their depositions kept secret in order to protect their own rights, but in order to protect the rights of others. Certainly, at least as to these other 39 Plaintiffs there is no problem in preserving any asserted rights to a fair trial in a criminal case.

These Plaintiffs have not presented any unusual circumstances to overcome the strong public policy in favor of keeping all pretrial discovery, especially in anti-trust litigation, open to the public. *Olympic Refining Co. v. Carter, supra*; *Pearson v. McCarthy, supra*. Indeed, their situation presents the usual situation in private anti-trust litigation where the issue normally is whether the parties have engaged in criminal conduct, since any violation of the Sherman Act constitutes a criminal offense

¹⁴ Indeed, the likelihood that after being fully informed many of these members of this class may choose to withdraw from this suit is demonstrated by the fact that of the original 72 named Plaintiffs to this action, 30 have already withdrawn from this lawsuit.

(15 U.S.C. §§ 1, 2). Certainly the courts will not seal the depositions in all private Sherman Act cases merely because they might reveal that one of the parties has violated the law; and, *a fortiori*, a plaintiff may not initiate a lawsuit and then enlist the Court's aid in keeping secret any evidence of criminal activity. As Judge Weigel stated below:

The plaintiffs come into the Court and they want damages . . . treble damages. If they come into Court voluntarily, why should this Court throw its arms around them and screen from visibility to anybody that wants to have an interest in anything criminal they may have done? What sense does that make? (Tr. 7-8).

Plaintiffs also took the somewhat novel position that they wished the Court to enter a sealing order in order to make Shell's discovery more effective. Indeed, they asserted "that Shell's discovery could not possibly be effective without it" (R. ¹²⁴X),¹⁵ Plaintiffs claimed that unless a secrecy order were entered they could invoke the privilege against self incrimination and refuse to answer any questions during the depositions (R. ¹²⁴X).

Aside from the dubiety of such claim of the privilege (see pp. 10-11, *supra*),¹⁶ Plaintiffs' invocation of the privilege is premature. In effect, plaintiffs requested the District Court to seal the depositions because they might give "extremely guarded testimony" or because "they

¹⁵ Of course this assertion that Shell will not be prejudiced proceeds from Plaintiffs' charge that Shell's purpose in opposing the sealing order was its desire to use its "right to discovery as a means to achieve an improper end," i.e. to conduct discovery for the Government in its criminal case (R. ¹²⁴8). Contrary to Plaintiffs' unsupported charge, Shell has opposed the sealing not for the purpose of helping the Government try its case, but because, as we have shown *supra* at pp. 11-13, the order will prevent Shell from preparing its defense.

¹⁶ See also the order of Judge Muecke in *Blakely Oil Inc. v. Shell Oil Co.*, Civ. 5510-Phx, (D. Arizona, September 15, 1966) at R. 148.

may be justified in remaining completely silent about certain aspects of their business" (R.¹⁴ 7). But plaintiffs are not entitled to a protective order because they claim that they may invoke the privilege against self incrimination. *Shiner v. American Stock Exchange*, 28 F.R.D. 34 (S.D.N.Y. 1961); *United States v. Lustig*, 16 F.R.D. 138 (S.D.N.Y. 1954); cf. *Kaeppler v. Jas. H. Matthews & Co.*, 200 F. Supp. 229 (E.D. Pa. 1961). As the Court held in *Lustig*, *supra*, at pp. 139-140:

The time to assert the plea is when specific questions are put to the defendant during the course of the examination.

* * *

To uphold the defendant's plea in advance of the taking of his testimony upon the mere filing of his affidavit asserting the privilege would take from the Court the determination of the basic issue of whether or not an answer in response to specific questions would incriminate the defendant or subject him to real danger and leave its determination entirely to the defendant. This is not the law.

That Plaintiffs' claim is premature is demonstrated by the fact that at least one,¹⁷ and possibly several, of the Plaintiffs were called as witnesses before the grand jury which returned the indictment in *United States v. California Shell Dealers Association, Inc.* (Criminal No. 41348 filed April 26, 1967), and have therefore received immunity from prosecution under the Antitrust Immunity Statute, 32 Stat. 904 (1903), 15 U.S.C. § 32¹⁸ (See *United*

¹⁷ See Appendix B.

¹⁸ The Antitrust Immunity Statute, as it appears at 15 U.S.C. § 32 (1964) reads:

"No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title: *Provided*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

States v. Monia, 317 U.S. 424 (1943)), and thus plainly cannot claim the privilege. *Brown v. United States*, 359 U.S. 41 (1959); *Kronick v. United States*, 343 F. 2d 436 (C.A. 9 1965).

Finally, there is no justification for requiring Shell to turn over to the plaintiffs copies of transcripts of depositions it has and will purchase. Plaintiffs below failed to give any reasons why this unusual provision was necessary. Certainly Shell is entitled to retain possession to these transcripts which it has and will purchase, at substantial cost, pursuant to Rule 30(f)(2). Plaintiffs have no legal right to these transcripts. The order below thus deprives Shell of its property without due process of law in violation of the provisions of the Fifth Amendment (United States Constitution, Amend. V).

II. THE ORDER BELOW IS A FINAL APPEALABLE ORDER

28 U.S.C. § 1291¹⁹ provides that an appeal may be taken from any final order of a District Court. The Supreme Court has made clear "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). An order which is collateral to rights asserted in an action which finally determines the rights of the parties and which will not be affected by a decision of the merits of the case, or which is "fundamental to the further conduct of the case" is appealable under 28 U.S.C. § 1291. *Gillespie v. United States Steel Corp.* (*supra* at p. 154); *DiBella v. United States*, 369 U.S. 121, 125-126 (1962); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1948); *Swift & Company Packers, et al. v. Compania Colombiana Del Caribe, S.A.*,

¹⁹ 28 U.S.C. § 1291 provides in pertinent part:

"The courts of appeals shall have jurisdiction of appeals from all final orders of the district courts of the United States . . ."

339 U.S. 684, 688-689 (1950); *Preston v. United States*, 284 F. 2d 514 (C.A. 9 1960). As the Supreme Court stated in *DiBella, supra*, at p. 126:

Similarly, so as not to frustrate the right of appellate review, immediate appeal has been allowed from an order recognized as collateral to the principal litigation because touching matters that will not "affect, or . . . be affected by, decision of the merits of [the] . . . case," *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 . . . when the practical effect of the order will be irreparable by any subsequent appeal. E.g., *Stack v. Boyle*, 342 U.S. 1; . . . *Swift & Co. Packers v. Compania Colombiana Del Caribe S.A.*, 339 U.S. 684, 688-689.

In *Cohen*, a stockholders' derivative action based on diversity jurisdiction, the District Court denied defendant's motion that plaintiff be compelled to post security for costs, as required by state law. On appeal the Court of Appeals for the Second Circuit held the order reviewable and reversed on the merits. *Beneficial Industrial Loan Corp., et al. v. Smith*, 170 F. 2d 44 (3rd Cir. 1948), *aff'd sub nom. Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1948). The Supreme Court affirmed, spelling out in detail the circumstances meriting prompt appellate review of collateral orders which do not terminate an action.

The Supreme Court held that since the order of the District Court dealt with a collateral subject which did not "make any step toward final disposition of the merits of the case," (337 U.S. at 546) it was a final appealable order. The order of the District Court, the Supreme Court explained, related to the posting of security—a claimed procedural right—which is "not an ingredient of the cause of action" (*Id.* at 546-47). Thus, it would "not be merged in [the] final judgment"; indeed, it would be "too late" at judgment to review the order and thus "the rights conferred by the statute, if it is applicable, will

have been lost, probably irreparably.”²⁰ (*Id.* at 546). In other words, a ruling is appealable if it determines “claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated” (*Ibid.*).

In *Gillespie v. United States Steel Corp.*, *supra*, the Supreme Court held that even though a collateral order was not final under the standards enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, *supra* (*viz.*: because the order would affect or be affected by the decision on the merits) it was nevertheless reviewable under 28 U.S.C. § 1291 if the ruling “was fundamental to the further conduct of the case” (399 U.S. at 154).

Judge Weigel’s order below falls squarely within the standards of both the *Cohen* and *Gillespie* decisions.

First, it is clear that Judge Weigel’s order finally determines Shell’s right to retain possession of transcripts of depositions of Plaintiffs. Shell has, and will, purchase these copies of transcripts of the depositions of Plaintiffs at substantial cost. Judge Weigel’s order, however, requires that, at the termination of this action, Shell turn over to the Plaintiffs all copies of such depositions. The “matter” does not remain “open, unfinished or inconclusive . . . this order of the District Court did not make any step towards final disposition of the merits of the case and will not be merged in final judgment” (*Cohen v. Beneficial Industrial Loan Corp.*, *supra*, at 546).

²⁰ The Court noted earlier that Section 1292(a)(1) [62 Stat. 929 (1948), as amended] “allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a *final and irreparable effect* on the rights of the parties.” 337 U.S. at 545 (emphasis supplied).

If Shell is denied appellate review at this time, its right to challenge this determination of its right to retain possession of transcripts which it has purchased will be irreparably lost. For even if Shell's time in which to appeal from Judge Weigel's order had not been deemed to have expired (Rule 73(a), Federal Rules of Civil Procedure), the order below requires Shell to turn over its copies of the transcript of these depositions regardless of the disposition of the case. Thus, if the case is ultimately settled or if Shell prevails on the merits, there would be no adverse judgment from which Shell could appeal.

Second, the order below is "fundamental to the further conduct of the case" for it will prevent Shell from adequately preparing its defense. As has already been shown (*supra*, pp. 11-12), Shell cannot prepare its defense in a meaningful fashion unless it is able to review the Plaintiffs' testimony with its operating personnel and with other Shell dealers. Moreover, Judge Weigel's sealing order is likely to affect the identity of the parties to this action (*supra*, pp. 12-13).

Thus, it is clear that Judge Weigel's order is a final order reviewable at this time pursuant to 28 U.S.C. § 1298 since it is both a collateral final decision and is "fundamental to the further conduct of [this] case."

III. IF THE APPEAL HEREIN IS IMPROVIDENT THIS COURT SHOULD REVIEW THE ORDER BELOW BY TREATING THE APPEAL AS A PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

Although we submit that the order below is clearly appealable, if this Court determines that it is not reviewable pursuant to 28 U.S.C. § 1291, the Court should still review the order by treating the appeal as a petition for a writ of mandamus or prohibition under the All Writs Act (28 U.S.C. 1651(a)). *Olympic Refining Co. v. Carter*, 332 F. 2d 260 (C.A. 9 1964) *cert. denied*, 379 U.S. 900 (1964);

Continental Oil Company v. United States, 330 F. 2d 347 (C.A. 9 1964); *Steccone v. Morse-Starrett Products Co.*, 191 F. 2d 197 (C.A. 9 1951); *Shapiro v. Bonanza Hotel Co.*, 185 F. 2d 777 (C.A. 9 1950).

Under the All Writs Act this Court "may issue all writs necessary or appropriate in aid of [its] jurisdiction."²¹ Under modern practice, as applied by this Court with the Supreme Court's approval, interlocutory orders may be reviewed under the All Writs Act in "extraordinary" or "exceptional" cases where the remedy of appeal from a final decision is inadequate (*Ex Parte John H. Fahey*, 332 U.S. 258 (1947); *Hartley Pen Co. v. United States District Court*, 287 F. 2d 324 (9th Cir. 1961)) or where a fundamental question may be resolved in the exercise of supervisory control of inferior courts (*La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Shapiro v. Bonanza Hotel Co.*, *supra*). As this Court stated in *Hartley Pen Co.*, *supra*:

We do not agree that the power granted this Court under the All Writs Act is to be reserved for a "cause celebre". In our view the remedy is available in an ordinary case within our jurisdiction if ordinary remedies are inadequate and there are present exceptional and extraordinary circumstances which require the issuance of an extraordinary writ to prevent a grave miscarriage of justice (287 F. 2d at 328).

It is well settled that a mandamus is the proper remedy for reviewing sealing orders which are not otherwise appealable. *Ex Parte Upperco*, 239 U.S. 435 (1915); *Olympic Refining Co. v. Carter*, *supra*.

Moreover, the facts of this case present exceptional and extraordinary circumstances and raise a novel and fundamental question which should be resolved in the exercise

²¹ The All Writs Act, 28 U.S.C. § 1651(a), provides:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

of this Court's control of inferior courts—a question of first impression that calls for the construction of Rule 30(b) Fed. R. Civ. P. in a new context. We have not discovered, and Plaintiffs below failed to cite, a single case where a court ordered such a protective order in this situation at the behest of the party who initiated the litigation. The Supreme Court has recently made clear that mandamus is the proper remedy when a challenged discovery order presents an issue of first impression under the Federal Rules of Civil Procedure. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). As the Court held in that case:

We recognize that in the ordinary situation where the sole issue presented is the district court's determination that "good cause" has been shown for an examination, mandamus is not an appropriate remedy, absent, of course, a clear abuse of discretion. See *Bankers Life & Casualty Co. v. Holland*, *supra*, 346 U.S. at 383 . . . Here, however, the petition was properly before the court on a substantial allegation of usurpation of power in ordering any examination of a defendant, *an issue of first impression that called for the construction and application of Rule 35 in a new context* (379 U.S. at 111, emphasis added).

Not only does the order below raise an issue of first impression under the Federal Rules of Civil Procedure, but this issue arises in the context of a conflict between two judges on the same issue and in the same case. Judge Weigel and Judge Sweigert were each presented, based upon identical rationales, with requests for sealing orders. As a result of this conflict the parties are in an anomalous position which calls for the Court to exercise its discretion and resolve the conflict. *United States v. United States District Court*, 226 F. 2d 238 (C.A. 8 1955). Clearly, the decision of the two judges below raises a fundamental question which should be resolved in the exercise of this Court's supervisory control of inferior court. *Schlagenhauf v. Holder*, *supra*; *La Buy v. Howes Leather Co.*, *supra*. As

the Eighth Circuit Court of Appeals stated in discussing the criteria involved in the question of whether or not to review a procedural order under the All Writs Act:

. . . the critical issue raised at this juncture strikes at a fundamental procedural question . . . the resolution of this question . . . may serve to avoid a conflict in the district courts of this circuit . . . [O]ur present consideration may likewise serve to crystallize this problem and afford a clear opportunity for its further review (*Atlass v. Miner*, 265 F. 2d 312, 313 (C.A. 7 1959), *aff'd* 363 U.S. 641 (1960)).

Finally, Judge Weigel's order, as we have shown, constitutes an abuse of discretion. If the order is not reviewed at this time a miscarriage of justice will result, for the effect of that order, as shown above, *supra*, pp. 11-13, is to preclude Shell from preparing its defense to this action. In this situation "it would seem a part of wise judicial economy, if not necessity, to meet the issue now without subjecting the parties and the Court to the delay and burden which would be caused by the ultimate reversal clearly indicated." *Padovani v. Bruchhausen*, 293 F. 2d 546, 548 (C.A. 2 1961).²²

²² The recent Supreme Court decision on mandamus in *Will v. United States*, November 13, 1967, 36 L.W. 4017, is readily distinguishable from the line of cases cited above in that it concerns the use of mandamus by the government in criminal proceedings. The Court there held that such use of mandamus was severely restricted because of the defendant's right in criminal prosecution to a speedy trial, and the general policy that "appeals by the Government in criminal cases are something unusual, exception, not favored" (36 L.W. 4018). After noting the distinction between the more liberal use of mandamus in civil actions as compared to criminal proceedings, the Court ultimately grounded its decision upon the Court of Appeals' failure to "supply any reasoned justification of its action" (36 L.W. 4021). As the Court stated, "A mandamus from the blue without rationale is tantamount to an abdication of the . . . expository and supervisory functions of an appellate court" (36 L.W. 4022).

CONCLUSION

For the foregoing reasons, we respectfully submit that the District Court's Protective Order Pursuant to Rule 30(b) of the Federal Rules of Civil Procedure be reversed, or in the alternative, that a writ of mandamus be issued directing the District Court to vacate that order.

Respectfully submitted,

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DATED: December 22, 1967.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

GERALD KADISH
Attorney

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before: Hon. William T. Sweigert, Judge

No. 47261

RUSSELL L. JONES, ET AL., *Plaintiff*,

v.

SHELL OIL COMPANY, *Defendant*.

APPEARANCES:

For the Plaintiffs:

JOSEPH L. ALIOTO,
represented by: KEITH E. PUGH, JR., Esq.

For the Defendant:

MESSRS. HOWREY, SIMON, BAKER & MURCHISON,
represented by: PAUL E. d'HEDOUVILLE, Esq.

Plaintiffs' Motion for Protective Order

November 20, 1967

Monday

THE CLERK: Civil Action 47261, Jones, et al., vs. Shell Oil Company. Plaintiffs' Motion for Protective Order.

MR. PUGH: Office of Joseph Alioto by Keith Pugh for plaintiff and moving party.

MR. d'HEDOUVILLE: Paul E. d'Hedouville of Howrey, Simon, Baker & Murchison, attorney for Shell Oil Company.

THE COURT: This is the one where you want a protective order?

MR. PUGH: Yes. We seek a protective order with respect to the answers to certain selected interrogatories which the plaintiffs will be filing with the Court shortly.

We are in effect seeking to extend the coverage which Judge Weigel ordered on the depositions of the plaintiff to the plaintiffs' answers to interrogatories. This matter came up during the interrogatory aspect, came up during the extensive briefing after hearing on the depositions' protective order.

At that time we informally asked the Court to extend the scope of the depositions' protective order to the interrogatory answers and said that if the Court desired it to be formalized we would formalize it and that was the desire of Judge Weigel.

THE COURT: Is that all you want now, to have the depositions sealed?

MR. PUGH: The depositions have already been ordered sealed. We want the interrogatory answers also sealed, answers to five interrogatories.

THE COURT: Have you any objection to it?

MR. d'HEDOUVILLE: Yes, Your Honor, we do object to it.

THE COURT: Why? Would there be any harm done by doing it?

MR. d'HEDOUVILLE: We think in general terms there is harm in withholding this information from the public eye, particularly from the eyes of the Department of Justice which is really the object of the plaintiffs' motion.

Secondly there is harm to the defendant in this action. Many of these answers, including the deposition answers for that matter, are important as part of our pretrial discovery efforts. We have certain witnesses who are available to us and we would like to be able to show them these answers as a means of comparing their testimony to these answers, and again this is withheld from us.

Third, we would like to show some of these answers to personnel of the Shell Oil Company. After all, the plaintiffs are really people of the Shell Oil Company. They bear the Shell trademark.

THE COURT: The plaintiffs brought the suit?

MR. d'HEDOUVILLE: That is right, Your Honor.

THE COURT: Now they want to seal up their answers?

MR. d'HEDOUVILLE: That is right.

THE COURT: But Judge Weigel said to seal the deposition. Why did he say to seal the deposition?

MR. d'HEDOUVILLE: We believe Judge Weigel abused the discretion in that matter and we have filed a notice of appeal to the Ninth Circuit, and whatever this Court decides I believe that order should be subject to the appeal so we won't have to perfect our appeal on this matter.

I want to call Your Honor's attention to one particular individual who is asking for this protective order. This is a plaintiff by the name of Richard Gray. Richard Gray had his deposition taken and he testified at his deposition that he appeared before a Federal Grand Jury, which Federal Grand Jury returned the indictments.

THE COURT: People always have the right to testify on the ground it might incriminate them.

MR. d'HEDOUVILLE: Right.

THE COURT: Motion denied.

MR. PUGH: There are strong constitutional overtones.

THE COURT: Motion is denied. I have gone over it.

MR. PUGH: Your Honor, in this instance—

THE COURT: The motion is denied.

MR. PUGH: I am not sure the Court is aware of the structure of the case. We have an indictment of the plaintiff and we also have a counter-claim—

THE COURT: Motion is denied.

MR. PUGH: Thank you, Your Honor.

APPENDIX B

Shell designated pages 1, 3, 4, 93-96, 212-215 of the deposition of Richard Gray, dated July 24, 1967, as part of the record on appeal (R. 159). However, the clerk of the District Court did not include these pages in the record filed in this Court. We are therefore reproducing these pages as Appendix B.

1 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 47,261

RUSSELL L. JONES, ET AL., *Plaintiffs*,

v.

SHELL OIL COMPANY, *Defendant*.

DEPOSITION OF RICHARD GRAY

Monday, July 24, 1967

3 BE IT REMEMBERED that, pursuant to Notice, and on Monday, July 24, 1967, commencing at the hour of 10:00 o'clock a.m. thereof, at Room 1010, Shell Building, San Francisco, California, before me, HARRY A. CANNON, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared RICHARD GRAY, called as a witness by the defendant, who, being by me first duly sworn, was thereupon examined and interrogated as hereinafter set forth.

JOSEPH L. ALIOTO, ESQ., MAXWELL M. BLECHER, ESQ., and KEITH E. PUGH, JR., ESQ., represented by KEITH E. PUGH, JR., ESQ., appeared as counsel on behalf of the plaintiffs; and

MESSRS. HOWREY, SIMON, BAKER & MURCHISON, represented by WILLIAM SIMON, ESQ., appeared as counsel on behalf of the defendant.

Richard Gray.

called as a witness by the defendant, being first duly sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION BY MR. SIMON:

MR. SIMON: Q. Would you give the reporter your name and address, please.

A. My business address?

Q. Both, please.

A. Richard Gray, 6005 Jarvis Avenue, Newark, California, business address.

35219 Blackburn Drive, Newark, my home address.

Q. Mr. Gray, how long have you been making a living in the gasoline business?

A. About 19 years.

Q. Prior to October 1961, what did you do?

A. Just previous to that I was working for Southern Pacific Railroad for a short time.

Q. For how long?

A. Oh, probably three or four months.

Q. This would be in the summer of 1961?

A. No. I believe it was in the winter, during the Christmas rush.

Q. Prior to that what did you do?

A. I worked for U. S. Naval Air Station, Alameda.

Q. And you in 1961 were not in the gasoline business?

* * * * *

93 A. Wayne Campbell.

Q. Who else?

A. Oh, various other ones that I can't call by name right at the present.

Q. What was the purpose of those meetings?

A. Other than to form the association, I really don't know.

Q. Mr. Gray, did you testify before the Federal Grand Jury?

A. I did, sir. I sure did.

Q. When?

A. I don't remember the date.

Q. Tell me how many months ago.

A. It was in '66, I believe.

Q. Was your memory better on these subjects at that time than it is now?

A. It could have been, due to the fact that it was quite some time ago and it was more fresh and I did have some notes at that time.

Q. What happened to those notes?

A. I don't know whether I still have them or not. I believe I do.

Q. Do you know where they are?

A. I believe they are at my residence.

Q. Could you bring them with you tomorrow?

A. I can't come over here tomorrow. I have got a
94 business to operate right now. I'm running short-handed. I also am an area director for a Little League Tournament that has just started. It's the first game today and I have got to be there to direct it. I have got three employees that just quit.

Q. I didn't ask that.

A. I can't make it to another meeting. It is not possible.

Q. Where are those notes?

A. At my home?

Q. Where?

A. If I have them, if I can find them.

Q. Well, do you have them?

A. That's what I say, if I can find them. I would have to be there, right there, to pull open a drawer and look in to be sure they are there. I'm not certain they are still there.

Q. Will you bring those notes when this deposition resumes the next date, whether it is tomorrow or the date the court orders?

A. I could.

Q. Now in addition to the notes, does the fact that it occurred closer to the time of the events mean that your grand jury testimony would be more reliable because you had a better memory at that time?

A. Yes, but most of my notes are not pertaining
95 to any of the information that you are asking here.

My notes primarily pertain to my own individual problems at my own service station and as pertaining to Shell Oil Company and at the time of the grand jury investigation I felt that that was the line of inquiry that they were asking for.

Q. Well, in fact were you asked questions before the grand jury along the same lines that I had asked you questions here this morning?

A. I would say quite similar. Even in my grand jury inquiry I told them many times that I couldn't remember, I wasn't sure, I wasn't certain, I didn't know the dates.

Q. But was your memory better than it is now?

A. Oh, absolutely it was better at that time, yes.

Q. You were able to give them more information than you are able to give me, is that correct?

A. That could be a possibility. I don't know how much information that I have given you here that you are wanting, so I don't know how much I gave to the grand jury that they were wanting.

Q. Well, on the—

A. The only thing I could do was to answer to the best of my ability.

Q. On the subjects that I questioned you this morning as to which you were also questioned before the
96 grand jury, were you able to give them more information than you have been able to give me?

A. I don't think so, no.

Q. Is your memory just as good here today on all those subjects?

A. No, definitely not.

Q. Well, if your memory is not as good today, it would

seem to me to follow that you were able to give more answers to the grand jury than you have given me.

A. I would say basically—

MR. PUGH: I object to this whole line of questioning. I think you are arguing with the witness. I think there is no question that if you testified before the grand jury closer in time and proximity to the events that he was testifying about he remembered more about them at that time than he does today. To the degree to which he remembers more, I think it is impossible to ask him that question.

MR. SIMON: I take it, Mr. Pugh, you would join with me in a motion to the court that we be given access to the transcript of his grand jury testimony?

MR. PUGH: No, I won't join in that motion. He is available here to ask questions of to the best of his memory today.

MR. SIMON: This is a breaking point in my outline, if you want to break for lunch, it being 12:30.

* * * * *

212 A. I cannot.

Q. Who brought the surveys to the meeting?

A. I don't have any idea.

Q. Who presented them to the meeting?

A. I don't know whether they were even presented at at a meeting or not.

Q. Well, who initiated their being passed around?

A. I have no idea.

Q. At how many meetings that you attended were surveys of prices either discussed or reviewed or passed around?

A. I don't have any idea.

Q. Would it be 10, 20?

A. I couldn't comment on it. I don't know.

Q. You don't know whether it was either 10 or 20 or 30?

A. No. Sure don't.

MR. PUGH: Or one?

THE WITNESS: Right.

MR. SIMON: Q. Now, who else made surveys of prices besides the people you have already mentioned during the fall of 1966?

A. Nobody that I know of.

Q. Now, sir, yesterday afternoon you testified that you had some documents that you used before the grand jury and that you would bring them if you could
213 find them.

A. No. I had some records that I kept, but they were pertaining to my—wasn't pertaining to any association meetings. It was pertaining to my termination by Shell Oil Company primarily and the circumstances and the events leading up to it and events after my termination.

Q. You testified you had some documents that you brought with you to the grand jury room?

A. Correct. Those are the documents that I took, but I didn't use them at the grand jury, because the questions thta they asked me were not pertaining to the information that I had in those documents.

Q. Were you asked any questions before the grand jury in which you used those documents to refresh your recollection?

A. No.

Q. Did you give any testimony before the grand jury on the subject matter of the documents?

A. Yes, I believe so.

Q. Did you give that testimony without looking at the documents?

A. Only partially. Yes.

Q. And to what extent did you look at the documents in answer to—

A. I didn't look at the documents. I only
214 partially gave a statement to the grand jury pertaining to what was in the documents.

Q. Did you find those documents last night?

A. I did not even look.

Q. I see.

A. Like I told you, I'm involved in this Little League. I got there just at the starting game. We did win the game. And we had a little celebration thereafter. My son has got the mumps. And we were busy taking his temperature.

Q. But you did not take the trouble to look and see if you still had the documents?

A. Not take the trouble. I just forgot about it in my haste to get over here this morning and beat the traffic.

Q. So we still don't know whether the documents are at your house?

A. No, we do not.

Q. Now, sir, besides the subject matter of the documents, what other subjects were interrogated on before the grand jury?

A. Man, I don't know. I'm sure you have a record of that and—

Q. No, I don't. But I hope to get it.

A. You'd have to go after that testimony. I don't remember. It was questions on meetings similar to
215 the questions that you're asking me here and questions pertaining to the telegrams that were sent and—

Q. What other subjects?

A. They asked about stamps.

Q. Were you asked about meetings at which price increases were discussed?

A. I was, yes.

Q. What did you say in response to the questions about meetings at which prices were discussed?

A. I really don't remember.

Q. You don't remember what you said?

A. I probably said I really don't remember to them.

Q. How long were you before the grand jury?

A. Let's see. I think in the area of around an hour, hour and a half maybe.

Q. Did you waive immunity before the grand jury?

A. I did not, no.

Q. Can you recall anything that you testified to before the grand jury with respect to dealer meetings and the matter of retail prices that you have not testified to in this deposition yesterday or today?

A. No, I can't.

Q. Now, sir, yesterday you referred to a man named Jim. And you some times referred to him as Big Jim.

Can you give me his last name?

A. I believe it's Turner. I'm not positive. I'm * * *

* * * * *

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 22,441

SHELL OIL COMPANY, *Appellant*,
v.
RUSSELL L. JONES, *et al.*, *Appellees*.

No. 22,441-A

RUSSELL L. JONES, *et al.*, *Appellants*,
v.
SHELL OIL COMPANY, *Appellee*.

On Appeal from the United States District Court for the
Northern District of California

REPLY BRIEF FOR APPELLANTS IN NO. 22,441 AND
ANSWERING BRIEF FOR APPELLEES IN NO. 22,441A

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4 Moore, Federal Practice, ¶ 26.22 [5] at p. 1296 (2d Ed. 1963)	3

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 22,441

SHELL OIL COMPANY, *Appellant*,

v.

RUSSELL L. JONES, *et al.*, *Appellees*.

No. 22,441-A

RUSSELL L. JONES, *et al.*, *Appellants*,

v.

SHELL OIL COMPANY, *Appellee*.

**On Appeal from the United States District Court for the
Northern District of California**

**REPLY BRIEF FOR APPELLANTS IN NO. 22.441 AND
ANSWERING BRIEF FOR APPELLEES IN NO. 22.441A**

1. It is hornbook law that courts "will not anticipate a question of constitutional law in advance of the necessity of deciding," *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., dissent-in part). Nevertheless, Plaintiffs below, who are appellants in No. 22441-A and appellees in No. 22,441, insist upon trying to get this Court to decide a constitutional issue which is not

before the Court—*i.e.*, whether plaintiffs to a lawsuit are entitled to frustrate the defendant's discovery by invoking the privilege against self-incrimination and refusing, on that ground, to answer questions during depositions. Throughout their brief they continually maintain that to require them to answer questions in depositions or submit answers to interrogatories would somehow constitute an abridgment of the Fifth Amendment privilege against self-incrimination. But the short answer to their argument is that they have never claimed the privilege.

The law is well settled that the privilege against self-incrimination may not be asserted in advance of questions actually propounded. *Brown v. United States*, 356 U.S. 148, 155 (1958); *United States v. Harmon*, 339 F. 2d 354 (C.A. 6, 1954), *cert. denied*, 380 U.S. 994 (1965); *Marcello v. United States*, 196 F. 2d 437 (C.A. 5, 1952); *Shiner v. American Stock Exchange*, 28 F.R.D. 34 (S.D.N.Y. 1961); *United States v. Lustig*, 16 F.R.D. 138 (S.D.N.Y. 1954). As the Supreme Court stated in *Brown v. United States*, *supra* at p. 155:

A witness who is compelled to testify . . . has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate. It would indeed be irrelevant for him to do so.

Clearly then, Plaintiffs' invocation of the privilege before this Court is premature, and this Court should not decide this constitutional question in advance of the necessity for doing so.¹

2. In any event, it is likewise clear that Plaintiffs may not prosecute this litigation as plaintiffs and at the same

¹ At least one of the Plaintiffs testified before the grand jury which returned the indictment in *United States v. California Shell Dealers Association, Inc.* (N.D. Cal. Criminal No. 41348, filed April 26, 1967) and therefore may not claim the privilege against self-incrimination (see Shell's appeal brief, pp. 15-16, 29-35).

time refuse to answer questions on the grounds of the privilege against self-incrimination. *Independent Productions Corp. v. Loew's, Inc.*, 22 F.R.D. 266 (S.D.N.Y. 1958); *Henrik Mannerfrid, Inc. v. Teegarden*, 23 F.R.D. 173 (S.D. N.Y. 1959), 4 Moore, Federal Practice, ¶ 26.22 [5] at p. 1296 (2d ed. 1963).

Plaintiffs have suggested (Plaintiffs' Brief, p. 30) that the Second Circuit Court of Appeals reversed the decision in *Independent Production Corp. v. Loew's, Inc.* However, in fact, the Second Circuit upheld the trial court's decision that a plaintiff may not invoke the privilege against self-incrimination. Its decision reversed a District Court ruling dismissing the complaint because of plaintiff's failure to answer questions in depositions because, it held, the District Court should have first resorted to the remedies provided in Rule 37, *Fed. R. Civ. P.*, rather than ordering a dismissal. *Independent Productions Corp. v. Loew's, Inc.*, 283 F.2d 730 (C.A. 2, 1960).

3. Plaintiffs also suggest that Shell has asserted that they have irrevocably waived the constitutional privilege against self-incrimination (Plaintiffs' Brief, p. 24). Plaintiffs, however, misconstrue Shell's position. Shell maintains, and the relevant cases hold, not that Plaintiffs have irrevocably waived their privilege, but that Plaintiffs may not institute a lawsuit and then refuse to answer relevant questions by invoking the privilege against self-incrimination. In an analogous situation, the Supreme Court has held that a witness who voluntarily takes the stand and testifies may not refuse to answer questions on cross-examination on the grounds that such answers may tend to incriminate him. *Brown v. United States*, *supra*. As the Court stated at pp. 155-156:

Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the

Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute.

Similarly here, Plaintiffs having put certain matters into dispute by initiating this lawsuit cannot reasonably claim that the Fifth Amendment gives them an immunity from examination on these matters.

In any event, if Plaintiffs believe that any questions asked may tend to incriminate them, they should claim the privilege if and when these questions are asked so that the District Court may rule on their claim. As the Supreme Court stated in *Hoffman v. United States*, 341 U.S. 479 (1951), a decision relied upon by Plaintiffs throughout their brief, "The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the Court to say whether his silence is justified." *Id.* at p. 486; *Rogers v. United States*, 340 U.S. 367, 374 (1951).

4. Plaintiffs throughout their brief take the inconsistent position that although the Federal Rules provide for full pre-trial discovery, they will not fully cooperate and give full and open disclosure unless this Court permits them to keep such discovery secret. Thus, at page 9 of their brief, plaintiffs state:

The liberality of pre-trial discovery under the Federal Rules of Civil Procedure is surely one of the most beneficial and enlightened developments in modern jurisprudence. Private party litigants in the federal courts have the right to full pre-trial disclosure of opponents' cases.

Yet, elsewhere in their brief, plaintiffs threaten the Court that:

Without the protective orders it would be only natural for the plaintiffs to give extremely guarded testimony and answers (*Id.* at p. 14, and see *Id.* at p. 12).

Indeed, Plaintiffs take the anomalous position that sealing their depositions and answers to interrogatories “would foster and encourage a more effective program of discovery by Shell.” (*Id.* at p. 20). However, contrary to Plaintiffs’ contention, they have a duty to “cooperate in the discovery process” (*Id.* at p. 12) regardless of whether or not this Court holds that the fruits of discovery should be sealed.²

5. Contrary to Plaintiffs’ assertion (*Id.* at pp. 21-22), Shell has not read a portion of the protective order out of context. The protective order specifically bars Shell or its attorneys from disclosing the contents of the depositions of Plaintiffs to “operating personnel of the defendant or to any third party” (R. 152). Certainly, under the specific terms of the order, counsel for Shell could not disclose the contents of these depositions when questioning Shell’s operating personnel or other third parties.³

6. Plaintiffs’ reliance upon the dicta in *United States v. American Radiator and Sanitary Corp.*, 1967 Trade Cases ¶ 72,311 (C.A. 3, 1967), *cert. denied*, 36 U.S. Law Week 3308 (January 29, 1968), is misplaced. That case, and all of the other cases relied upon by Plaintiffs to support their position, involved the sealing of depositions where a party

² It should be noted that, contrary to Plaintiffs’ suggestion, they have not been cooperating in the discovery in this case. Thus, despite the existence of Judge Weigel’s sealing order, Plaintiffs, in December 1967, unilaterally announced that they would no longer submit themselves to deposition by Shell until ordered to do so by the District Court.

³ Although Plaintiffs insist that Shell is conducting discovery in this case for the government’s benefit and is actually prosecuting this appeal on the government’s behalf (Plaintiffs’ Brief, p. 19), this assertion is not supported by the record. Indeed as counsel for Shell made clear below, “I don’t work for the Department of Justice and I couldn’t care less what happens in that case” (Tr. 12).

is a defendant in both a civil and a criminal case.⁴ As explained in Shell's appeal brief, these cases are not apposite to the situation presented in this appeal.

7. Finally, although Plaintiffs do not attempt to justify the provision of Judge Weigel's order which requires Shell to turn over to Plaintiffs, at the termination of this litigation, all copies of their depositions, they now contend that this provision does not violate the due process clause of the Fifth Amendment because these transcripts do not have some inherent value (Plaintiffs' Brief, pp. 15-16). We are aware of no cases, and Plaintiffs cite none, which hold that property must have a large monetary value before a party is entitled to invoke the due process clause of the Fifth Amendment. Aside from the fact that these transcripts may be of future use to Shell in any future litigation involving Plaintiffs or other parties, the important fact is, that having already paid thousands of dollars for the transcripts, Shell is entitled to retain possession of them.

⁴ In *United States v. Simon*, 373 F. 2d 649 (C.A. 2 1967), *certiorari granted sub nom. Simon v. Wharton*, 386 U.S. 1030 (1967), cited at p. 9 of Shell's brief and p. 22 of Plaintiffs' brief, the Supreme Court entered the following *per curiam* order on December 18, 1967:

Upon consideration of the joint motion to vacate, the judgments of the lower courts are vacated and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the case as moot (36 U.S. Law Week 3252).

CONCLUSION

For the foregoing reasons, and for the reasons stated in Shell's appeal brief, the Court should reverse the District Court's order in No. 22441 and affirm the District Court's order in No. 22441-A.

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Dated: February 9 , 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Nos. 22,441 and 22,441-A
United States Court of Appeals
For the Ninth Circuit

SHELL OIL COMPANY,

Appellant,

VS.

RUSSELL L. JONES, et al.,

Appellees.

No. 22,441

RUSSELL L. JONES, et al.,

Appellants,

VS.

SHELL OIL COMPANY,

Appellee.

No. 22,441-A

**On Appeal from the United States District Court
for the Northern District of California**

**REPLY BRIEF FOR APPELLANTS (IN No. 22,441-A) ;
(APPELLEES IN No. 22,441)**

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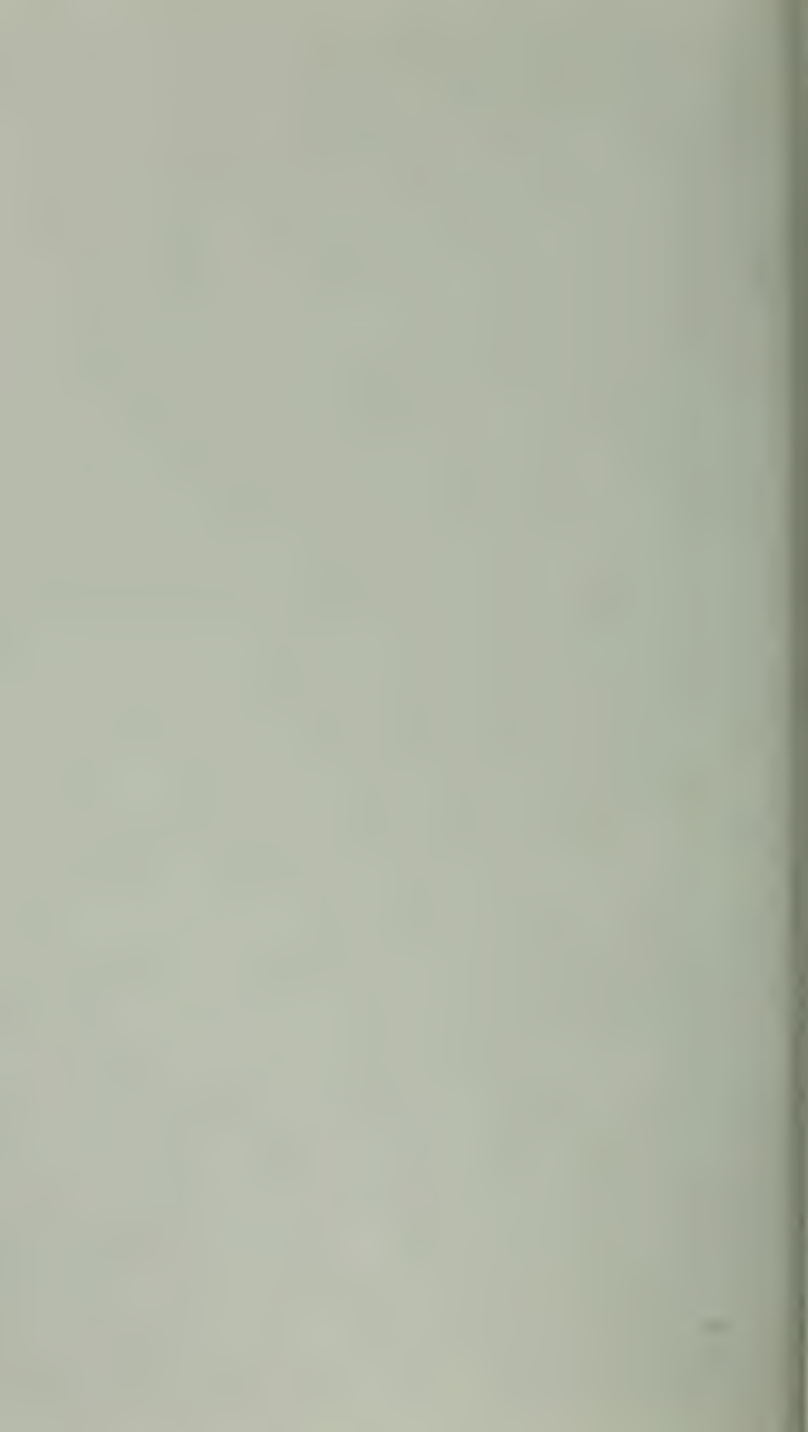
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I

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Nos. 22,441 and 22,441-A

**United States Court of Appeals
For the Ninth Circuit**

SHELL OIL COMPANY,

Appellant,

vs.

No. 22,441

RUSSELL L. JONES, et al.,

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RUSSELL L. JONES, et al.,

Appellants,

vs.

No. 22,441-A

SHELL OIL COMPANY,

Appellee.

**On Appeal from the United States District Court
for the Northern District of California**

**REPLY BRIEF FOR APPELLANTS (IN No. 22,441-A) ;
(APPELLEES IN No. 22,441)**

ARGUMENT

I

COURTS SHOULD CONSIDER THE RELEVANT CONSTITUTIONAL POLICIES OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IN PROTECTING LITIGANTS FROM ANNOYANCE, EMBARRASSMENT AND OPPRESSION WHICH RESULTS FROM AN ABUSE OF PRE-TRIAL DISCOVERY. THUS, PROTECTIVE ORDERS SEALING DEPOSITION TESTIMONY AND INTERROGATORY ANSWERS PURSUANT TO RULES 30(b) AND 33 ARE NECESSARY IN THE PRESENT CASE.

A. In its Reply and Answering Brief, Shell Oil Company urges this Court to ignore the “potential” privilege

against self-incrimination considerations raised by plaintiffs in seeking a protective order sealing depositions and interrogatory answers. Shell instructs the Court not to “anticipate a question of constitutional law in advance of the necessity of deciding”. (Reply Brief, p. 1).

The plaintiffs have not invoked their privilege against self-incrimination. Moreover, the plaintiffs wish to avoid the necessity of asserting that privilege. They desire to cooperate with Shell in its program of discovery. However, this cooperation cannot be realized so long as plaintiffs live in fear of the danger that information which is developed in the process of civil pre-trial discovery may be utilized by the Government in the related pending criminal prosecution.

This is the type of “oppression” which Rule 30(b) (and Rule 33) of the Federal Rules of Civil Procedure must guard against. *United States v. Simon*, 373 F. 2d 649, 654 (2nd Cir. 1967); *United States v. American Radiator & Sanitary Service Corp.*, 1967 Trade Cases ¶72,311 (3rd Cir. 1967).

It seems most incongruous to permit protective orders to be used to seal trade secrets and yet refuse such protection to preserve so important a constitutional liberty as the privilege against self-incrimination. A long line of decisions have recognized this need and have utilized protective orders to prevent oppressive self-incrimination. *Campbell v. Eastland*, 307 F. 2d 478 (5th Cir. 1962); *Harrigan & Sons v. Enterprise Animal Oil Co.*, 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp. v. Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952); *Perry v. McGuire*, 36 F.R.D. 272 (S.D. N.Y. 1964); *United States v. Parrott*, 248 F. Supp. 196 (D.C. 1965).

B. Shell's contention that the time is not ripe for an assertion by plaintiffs of their privilege (Reply Brief pp. 2, 3) is erroneous. Shell cites *Brown v. United States*, 356 U.S. 148 (1958) as authority for the rule that the privilege may not be asserted in advance of questions actually propounded (Reply Brief p. 2). Shell seems to have ignored the fact it has already propounded twenty (20) interrogatories, and that seven (7) of those interrogatories call for answers which could yield incriminatory information (see Brief for Appellees in No. 22,441 and Appellants in No. 22,441-A, Appendix C).

This Court has consistently held, following *Hoffman v. United States*, 341 U.S. 479 (1951), that the assertion of the privilege is justified under such circumstances. *Hashagen v. United States*, 283 F. 2d 345, 348 (9th Cir. 1960).

Indeed, on January 29, 1968, the United States Supreme Court re-affirmed the broad protective scope of the privilege. *Marchetti v. United States*, U.S., 88 S.Ct. 697 (1968); *Grosso v. United States*, U.S., 88 S.Ct. 709 (1968). The Court indicated, in these cases, that where individuals are required to reveal information that could "... significantly enhance the likelihood of their prosecution ..." or "... readily provide evidence which will facilitate their convictions ..." the privilege may be justifiably asserted (88 S.Ct. at p. 706). The duty to reveal information ends when the threat of incrimination appears.

Thus, even though plaintiffs have not yet actually invoked the privilege, they are presently entitled to do so in the absence of the issuance of Protective Orders.

C. Shell argues that the plaintiffs may not prosecute this litigation and at the same time assert their constitutional privilege (Reply Brief pp. 2, 3). In making this argument, Shell again attempts to distort the nature of this case. Plaintiffs do not desire to use their privilege against self-incrimination as a means of avoiding proper pre-trial discovery. Plaintiffs merely seek a protective order so as to insure that their own testimony given during pre-trial discovery will not become the evidence against them in a criminal case.

It is immaterial that the Protective Orders are being sought by parties plaintiff in the present case. Rules 30(b) and 33 do not limit eligibility for protective orders to defendants in a civil case. These rules provide protective orders for "any party" who demonstrates, as plaintiffs have in this case, that unsealed pre-trial discovery will cause oppression. F.R. Civ. Proc., Rules 30(b), 33. The plaintiffs justifiably fear that the information they reveal during pre-trial discovery will be improperly and oppressively used by the Government in its criminal prosecution. Thus both requested Protective Orders must be granted.

D. Shell urges that plaintiffs have a duty to cooperate in the discovery process (Reply Brief p. 5). Obviously this duty cannot supersede the right to remain silent in the face of questions which call for incriminatory information.

Shell, then, seems again to be implying that plaintiffs must elect or choose between asserting their constitutional privilege and going forward with this lawsuit. Such an

“election” or coerced waiver of the privilege would clearly be an unconstitutional abridgment of the Fifth Amendment. *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. N. J.*, 385 U.S. 493 (1967). The United States Supreme Court has expressly invalidated such procedural devices which exact a penalty for the assertion of the privilege. *Spevack v. Klein*, *supra*. Requiring plaintiffs to abandon their civil antitrust claim as the price for preserving and asserting their right to silence would, therefore, be tantamount to exacting an unconstitutional penalty for the exercise of the Fifth Amendment liberty. Such a contention is especially untenable in the present case where the entire “discovery *vs.* silence” dilemma can be avoided through issuance of the Protective Orders. The policy underlying the Fifth Amendment privilege should be read into Rule 30(b) thereby compelling the issuance of the Protective Orders sought by the plaintiffs.

E. In this case then, the Protective Orders can serve a function similar to that of an “immunity provision”. *Cf. Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965). The Orders permit Shell to discover facts which are relevant to the issues in the civil antitrust case, but it *prevents* the improper use of this information in the criminal prosecution by the Government. Indeed, the *Albertson* case requires a showing of such “immunity” as a condition to overriding the privilege and compelling disclosure of information. The Protective Orders sought by the plaintiffs, then, represent the minimum amount of protection to which they are entitled.

In deciding this Appeal, three competing interests must be considered and weighed:

- (a) the *legislative* policy in favor of private civil anti-trust enforcement (*Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322 (1955); *Olympic Ref. Co. v. Carter*, 332 F. 2d 260 (9th Cir. 1964));
- (b) the *procedural* policy in favor of liberal pre-trial discovery in civil actions (Sunderland, *The New Federal Rules*, 45 W. Va. L.Q. 3 (1938); and
- (c) the *constitutional* policy which protects individuals from compulsory self-incrimination. *Malloy v. Hogan*, 378 U.S. 1 (1964); *Hashagen v. United States*, *supra*).

Issuance of the Protective Orders requested by plaintiffs then becomes the only means of reconciling and resolving these competing interests and policies in the present case. With the Protective Orders, the civil action can proceed, pre-trial discovery may be conducted, and the plaintiffs' privilege against self-incrimination will be protected. Most important, however, the Government will be precluded from the improper utilization of the fruits of the civil discovery. As numerous cases have concluded, no other effective and reasonable alternative exists for resolving this apparent dilemma. *United States v. American Rad. & San. Service Corp.*, *supra*; *United States v. Simon*, *supra*; *Independent Prod. Corp. v. Loew's*, 283 F. 2d 730 (2nd Cir. 1960).

II

THE REQUIREMENT THAT SHELL RETURN ALL COPIES OF PLAINTIFFS' DEPOSITIONS UPON TERMINATION OF THIS LITIGATION IS REASONABLE, AND DOES NOT CONSTITUTE A DEPRIVATION OF SHELL'S PROPERTY WITHOUT DUE PROCESS OF LAW.

Finally, plaintiffs urge this Court to reject Shell's contention that the portion of Judge Weigel's Order which requires Shell, upon the termination of this litigation, to return all copies of depositions to plaintiffs, constitutes a deprivation of property without due process of law.

Rule 30(b) gives the Trial Court extensive discretion in fashioning effective orders and in preventing potential annoyance, embarrassment or oppression of any party to the litigation. Where Protective Orders are concerned, the Court must attempt to preserve the secrecy and confidentiality of the documents discovered. After the litigation is terminated, the Court loses effective control over the parties thereto—the Court would not be fully capable of enforcing its Protective Orders against the party in possession of the confidential information. Thus, requiring the return of the confidential documents is the only means of insuring that improper use is not made of the information therein contained.

Moreover, upon the termination of this litigation, the plaintiffs' depositions would no longer be of value or use to Shell. If, as Shell suggests, they become important in future litigation, then Shell can petition the Court for a return of the depositions. Under these circumstances, the Court would once again be able to effectively guaran-

tee that the confidentiality of the documents will be maintained.

Shell has failed to cite any authority whatsoever for its unique "due process" argument. When urging that one has been deprived of property without due process of law, the burden of showing unconstitutionality is upon the challenging party. *Nebbia v. New York*, 291 U.S. 502 (1934). Under the Fifth Amendment, all that is required is the existence of a rational basis for the regulation of the individual's economic or property right. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). *Cf. Day-Brite Lighting Co. v. Missouri*, 342 U.S. 421 (1952).

There being a rational basis for Judge Weigel's order that the depositions be returned, Shell has failed to prove that the order deprives them of property without due process of law.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the plaintiffs' earlier brief (Brief for Appellees in No. 22,441 and for Appellants in No. 22,441-A), this Court should affirm Judge Weigel's order sealing deposition testimony in No. 22,441 and reverse Judge Sweigert's denial of a protective order in No. 22,441-A.

Dated, February 26, 1968.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MAXWELL M. BLECHER.

No. 22443

In the
United States Court of Appeals
For the Ninth Circuit

ALLSTATE INSURANCE COMPANY, an Illinois
corporation,

Appellant,

vs.

NELSON CHRISTIAN DORR and AEDA DORR,
his wife, surviving parents of FELIX
MATTHEW DORR, deceased, et al,

Appellees.

Opening Brief of Appellant
Allstate Insurance Company

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No. 22443

In the

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ALLSTATE INSURANCE COMPANY, an Illinois
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NELSON CHRISTIAN DORR and AEDA DORR,
his wife, surviving parents of FELIX
MATTHEW DORR, deceased, et al,

Appellees.

Opening Brief of Appellant
Allstate Insurance Company

JURISDICTION

This action originated in the United States District Court for the District of Arizona, jurisdiction being vested in the District Court by virtue of there being complete diversity of Citizenship between the parties and the amount in controversy exceeding \$10,000.00 exclusive of interest and costs. (Paragraph I, Amended Complaint, TR 1, 28 USCA § 1332.) By Motion dated May 9, 1967, the Defendants, Nelson Christian Dorr and Jane Doe Dorr, his wife, moved for summary judgment against the Plaintiff, Allstate Insurance Company, and Safeco Insurance Company of America, the Third Party Defendant (TR 14). Such motion was

granted against Plaintiff, Allstate, by order dated September 5, 1967 (TR 58) and judgment was entered thereupon dated September 11, 1967 (TR 59) which included the finding pursuant to Federal Rule of Procedure 54(d) permitting a partial judgment to be final. Thereafter, and within the time provided by law, the Plaintiff Allstate proceeded upon this appeal (TR 61).

STATEMENT OF THE CASE

For convenience, the parties will be referred to in an abbreviated but easily recognizable manner; i.e. Allstate, Mr. and Mrs. Dorr or Dorrs, Mrs. Gutierrez, Badger and Safeco.

This is a declaratory judgment action brought by Allstate against all other parties (except Safeco, who was brought in as a third party defendant by Mrs. Gutierrez) to determine that Allstate had no coverage under a policy issued by it naming Mrs. Gutierrez as the named insured. (Plaintiff's Amended Complaint, Paragraphs II and IV, TR 1, 5.)

The Defendant, Virginia Wathen Gutierrez, filed an application for insurance with the Plaintiff, Allstate, which bore the date of January 29, 1964. (See Affidavit of Vic Hooper dated May 24, 1967, to which is attached the application of Defendant Gutierrez, both supporting documents to the Supplemental Response of the Plaintiff to Motion for Summary Judgment. TR 38-40.) It is to be noted that immediately preceding the signature of the Defendant Gutierrez (wherein she signed Virginia A. Wathen), two statements were answered in the negative by the Defendant Gutierrez. The first question was:

“Has any insurer cancelled or refused or given notice that it intends to cancel or refuse any similar insurance?”

The second of such questions was:

“Has any license or permit to drive any automobile been revoked, suspended or refused?”

Both of such questions were answered in the negative by the applicant and as will hereafter be seen, both of such questions were in fact answered falsely.

In addition, the applicant, Mrs. Gutierrez, also included false information in her application by stating under paragraph 4 on the second page of the application that she had received one ticket for an illegal turn in the past five years prior to the making of the application (TR 40). As will be seen hereafter, such statement is likewise false.

In addition, the applicant, Mrs. Gutierrez, also stated under paragraph 5 of the second page of the application that the principal operator of the motor vehicle would be herself and that her driver's license number “will follow”. The applicant, the Defendant, Mrs. Gutierrez, also under paragraph 4 of the second page indicated that she would be the only person in the household who would be operating the motor vehicle (TR 40). All of these statements were false.

Attached to the Supplemental Response to Motion for Summary Judgment is the affidavit of Mildred R. Kunkel certifying that the Defendant, Mrs. Gutierrez, on October 16, 1963, failed the law portion of her driver's test and she was, therefore, refused a driver's license. In addition, also attached thereto and certified by the same individual is an abstract of driving record of the Defendant, Mrs. Gutierrez, establishing that in addition to the illegal turn ticket that Mrs. Gutierrez admitted receiving in 1963, she had also within the five years preceding the application received citations and fines for driving while under the influence of intoxicating beverages, reckless driving and running a red light (TR 57).

After the accident with which this lawsuit is concerned, a recorded statement was taken from the Defendant, Mrs. Gutierrez, and her son, Robert. A transcript of that statement was attached to the Supplemental Response to Motion for Summary Judgment (TR 42 to TR 53). In such transcript the Defendant, Mrs. Gutierrez (contrary to the indication in her application for insurance that she had a valid driver's license and would provide the license number) admitted that she had failed a written test for the driver's license in Arizona and had not since secured a driver's license (TR 42). In addition, (and again contrary to her application wherein she indicated she would be the only principal operator of the motor vehicle) she acknowledged by her silence the truth of the statement of her son Bob Wathen that after she failed the driver's license test, the automobile was driven only by either Lombardo or her son Robert or other friends (TR 49). Also in such transcript the Defendant, Mrs. Gutierrez, admitted that prior to the application for the policy of insurance with Allstate, she was refused a renewal of insurance by her previous agent (TR 50-51). In a later portion of the statement, in describing the transaction with that agent, she stated that policy of insurance had been cancelled (TR 52).

After the Plaintiff issued its policy of insurance naming the Defendant, Mrs. Gutierrez, as named insured thereunder, and on May 26, 1964, Mrs. Gutierrez was in the insured automobile while it was being driven by Lombardo at which time the automobile struck a child pedestrian, the deceased son of the Defendants, Mr. and Mrs. Dorr (Amended Complaint, Paragraph VI, TR 6). Thereafter, Mr. Dorr, as the surviving father of his son, brought an action against Lombardo and Mrs. Gutierrez and recovered a judgment against them in the amount of \$20,000.00 to-

gether with interest and costs. (See the Motion for Summary Judgment of the Dorrs, together with the affidavit of Kenneth Rosengren attached thereto, to which is attached a copy of the judgment in Civil Action No. 163317 of the Maricopa County Superior Court, TR 19.)

Lombardo was also insured under liability policy issued by the Defendant Badger at the time of the accident (Paragraph VII, Plaintiff's Amended Complaint, TR 6), and the Amended Complaint seeks to determine the respective obligations as between the Defendant Badger and the Plaintiff with respect to the coverage afforded to the Defendant Lombardo as a result of the motor vehicle accident. (See Paragraph 4 of the prayer to the Amended Complaint, TR 8.)

The Motion for Summary Judgment was predicated upon the concept that under Arizona Revised Statutes 28-1170 A.R.S., Subsection F applied to all motor vehicle liability policies in the State of Arizona and as a result thereof, the liability of all insurance companies became absolute at the time that an accident occurred with respect to damage arising out of the accident, regardless of the fraud perpetrated by the insured initially in procuring the liability insurance policy (TR 16). With this concept, the Court agreed and entered judgment against the Plaintiff, Allstate.

SPECIFICATION OF ERRORS

The court erred in granting the motion for summary judgment of the Defendants Dorr for the following reasons:

(a) The court was required to accept as true the pleadings of Allstate supported by affidavits that the policy of insurance issued to Gutierrez was void for fraudulent misrepresentations in the application for insurance.

(b) The rights of the Defendants Dorr against Allstate are no greater than the rights of an insured and, thus, the void policy affords no coverage to the Defendants Dorr.

(c) The action of the court in enforcing coverage in the face of fraudulent misrepresentations by the Defendant Gutierrez is an deprivation of liberty and property without due process of law in violation of the 14th Amendment to the U. S. Constitution and in violation of Article II, Section 4, of the Constitution of the State of Arizona.

ARGUMENT OF THE CASE

Summary of Argument

1. The Federal and Arizona State Constitutions protect the right to contract under the due process clause.

2. Substantive due process prohibits the State of Arizona from interfering with the right of contract except in exercise of the police power to correct some actual or manifest evil.

3. The Financial Responsibility Act of Arizona is an exercise of the police power for the purposes enumerated by the Arizona Supreme Court.

4. The right to avoid a contract induced by fraudulent misrepresentations is a part of the right to contract protected by the due process clause.

5. Arizona law recognizes the right to avoid an insurance contract for misrepresentation of a material fact, if the insurance company *might have been* influenced by truth.

6. The application of the Financial Responsibility Act so as to prevent any insurer from avoiding any policy after loss has occurred regardless of what fraudulent misrepresentations are made is an unconstitutional application of the Act in that it deprives the insurer of substantive due process.

Both the 14th Amendment to the United States Constitution and Article II, Section 4 of the Constitution of Arizona provide that no persons shall be deprived of life, liberty or property without due process of law. Courts are most frequently called upon to review the procedural aspects of the due process clause whereby notice and an opportunity to be heard and to defend are the essential elements. (For example, see *Phoenix Metals Corp. v. Roth*, 79 Ariz. 106, 284 P.2d 645.)

Substantive due process as opposed to procedural due process has been recognized by the State of Arizona as well as the Federal Courts. *Valley National Bank of Phoenix v. Glover*, 62 Ariz. 538, 159 P.2d 292. The Arizona Supreme Court defined substantive due process as follows at 159 P.2d 298:

“Due process when applied to substantive rights, is interpreted to mean that the state is without right to deprive a person of life, liberty or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental powers.”

The due process clause does not have the effect of prohibiting the State from enacting police measures under the police power appropriate to correct some actual or manifest evil. Such a regulation must be reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community, *Atlantic Coastline v. Goldsboro*, 232 U.S. 548, but the method employed by the State must bear a real and substantial relationship to a public end. *Liggett Co. v. Baldridge*, 278 U.S. 105. These concepts have been defined in the following terms:

“In determining whether legislation is violative of constitutional restraints, the courts will confine them-

selves to the question, not of legislative policy, but of legislative power. The law must not be arbitrary, unreasonable or patently beyond the necessities of the case. The legislature may not under the guise of protecting public interests arbitrarily interfere with private business or impose unnecessary restriction upon lawful occupations. If the law prohibits that which is harmless in itself or if it is unreasonable and purely arbitrary, or requires that to be done which does not tend to promote the health, comfort morality, safety or welfare of society, it is an unauthorized exercise of power."

Departments of Financial Institutions v. Holt, (Ind.)
108 N.E.2d 629 at 634.

South Dakota described the rule in the following manner:

"Nevertheless, due process still requires that any exercise of the police power be reasonable, . . . and the regulatory means adopted by the legislature must bear a real and substantial relation to some actual or manifest evil, . . . and cannot be unreasonable, arbitrary or capricious. The determination of such issues is a judicial function and when a measure is found to be in violation of our fundamental law it is void."

To the same effect, see *Treigle v. Acme Homestead Assn.*, 297 U.S. 189, and *Smith v. Texas*, 233 U.S. 630.

Although the term "person" is used in both the 14th Amendment to the United States Constitution and in the Arizona Constitution, nevertheless, such term also applies to a corporation such as Allstate. *Covington v. Sanford*, 164 U.S. 592.

Thus, we must turn to the action of the State of Arizona and determine whether the District Court in following the rules layed down by the State of Arizona Supreme Court violated the Federal Constitution.

The passage of the Financial Responsibility Act by the legislature of the State of Arizona was an exercise of the police power. *Schecter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136. In *Jenkins v. Mayflower*, 93 Ariz. 287, 380 P.2d 145, the Arizona Supreme Court considered that portion of the Financial Responsibility Act of the State of Arizona set forth in the Statute 28-1170 A.R.S. (See Appendix A for the entire text of this statute.) In that case the Arizona Supreme Court held that Subsection B of the statute required all automobile liability policies to contain a provision commonly referred to as the "omnibus clause". By requiring such a provision be included in all automobile liability policies, the Supreme Court so applied the statute as to require insurance coverage be afforded any person driving a motor vehicle with the permission of the named insured under the automobile liability policy.

Subsequently, the Arizona Supreme Court in the case of *Sandoval v. Chenoweth*, 102 Ariz. 241, 428 P.2d 98, held:

"Under the rule expressed in *Mayflower*, the provisions of the Financial Responsibility law are applicable to the facts of the instant case whether or not the policy would be technically classified as a 'certified' policy. A.R.S. Sec. 28-1179 expressly states as follows:

'F. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

"1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle liability policy occurs. The policy may not be cancelled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurrence of the injury or damage, and no statement made by the insured or on

his behalf *and no violation of the policy shall defeat or void the policy.*" (Emphasis added by the court.) 428 P.2d 101.

The District Court applied that same provision of the statute in order to hold as a matter of law that Allstate could not secure a determination that the policy of insurance was void *ab initio* by virtue of the fraudulent misrepresentations of the applicant Gutierrez.

It would seem unquestioned that as an incident to the right to contract without unreasonable restraint included the right to freely contract and to avoid those contracts not freely made (that is, made only by virtue of the inducing fraudulent misrepresentations).

A similar concept is the concept that the liberty of contract involves as one of its essential attributes the right to terminate a contract subject only to civil liability for unwarranted termination. This concept has been enumerated on many occasions. 16 AmJur 2d 706, *Constitution of Law*, Sec. 373. The concept has been frequently applied in connection with statutes which prohibit employers from attaching conditions to employment. 68 A.L.R. 1269.

It is not surprising that the courts would so interpret the provisions of the Constitution inasmuch as the right to contract freely without unreasonable restraint is considered one of the fundamental liberties of the individual protected by the 14th Amendment. *U.S. v. Seven Oaks Dairy Co.*, 10 F.Supp. 995 (D.C. Mass. 1935). The right of liberty of contract was a concept originally advanced by Justices Bradley and Field in the *Slaughterhouse* cases, 16 Wall 36 (1833). Such concept was elevated to the status of an accepted doctrine in 1897 in *Allgeyer v. Louisiana*, 165 U.S. 578. Freedom from interference is the general rule and restraint upon the liberty of contract is the exception which

can be justified only by exceptional circumstances. *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522.

In *Conold v. Stern*, (Ohio) 35 N.E. 2d 133, the Supreme Court of Ohio held that to deprive the insurance company of a provision of the insurance policy would be to violate the due process clause. The exact language doubly applicable here is as follows:

“The conditions and limitations of the policy are enforceable, not only against the insured but against all persons who seek relief under it. Otherwise, the statute would violate the due process clause of the constitution.”

One of the very questions falsely answered by the applicant Gutierrez in the instant case has been held to give the insurance company the right to declare the policy void. The Arizona Supreme Court held as follows:

“... When an insurance company has asked of an applicant whether he has previously been rejected for insurance, a false answer is sufficient to authorize the company to declare the policy void without the necessity of proving whether it would have rejected the application if it had knowledge of that fact.”

First Benefit Society v. Fisk, 55 Ariz. 290, 101 P.2d 205, at 207.

See also *Illinois Bankers Life Assn. v. Theodore*, 44 Ariz. 160, 34 P.2d 423; *American National Ins. Co. v. Caldwell*, 70 Ariz. 78, 216 P.2d 413; *Modern Woodmen of America v. Stevens*, 70 Ariz. 232, 219 P.2d 322; *Mutual Life Ins. Co. of N.Y. v. Morairty*, 178 F.2d 470; *Byrnes v. Mutual Life Ins. Co. of N.Y.*, 217 F.2d 497.

When a state invokes the police power as a justification for infringing upon 14th Amendment rights, the action of the State will be upheld only when that action bears a real

and substantial relation to the end sought to be accomplished. *Liggett Co. v. Baldrige*, *supra*, at 73 L.Ed. 208; *Department of Financial Institutions v. Holt*, *supra*. The purpose of the Arizona Financial Responsibility Act is described in *Schechter v. Killingsworth*, *supra*, at 380 P.2d 140 as follows:

“The Financial Responsibility Act has for its principal purpose the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons. It accomplishes the objective by requiring proof of financial responsibility by those involved in an accident, either by a showing of insurance which covers deposit of cash or securities. It may, as incidental purposes and effects, because of the threat of loss of driving rights following an uninsured accident, (1) encourage operators of motor vehicles to obtain liability insurance, and (2) encourage drivers to drive more carefully. Because the uninsured motorist can avoid the adverse effects of the statute without obtaining insurance, and without improving his driving practices (i.e. by putting up security—here \$425.00—or by obtaining a release from the injured party, or an agreement for payment of damages in installments) we cannot consider either the encouragement to obtain insurance or the improvement of safety conditions on the highway to be primary objectives of this law.”

It seems clear that depriving an insurance company of the right to declare void a contract induced by fraud is not a reasonable method of accomplishing those ends described.

The fact that the claim being asserted against the insurance company here is asserted by one other than the applicant who made the false statements does not affect the right of the insurance company to avoid coverage, for the rights of others claiming against or under the insured

Gutierrez can rise no higher than the rights of Gutierrez herself. *Conold v. Stern, supra; State Farm Mut. v. Butler*, (Va.) 125 S.E.2d 823 at 827. This court in construing Arizona law has said much the same thing in *Byrnes v. Mutual Life Ins. Co.*, 217 F.2d 497, at 502, wherein it was said:

“This court, in the Widow’s case and the Supreme Court of Arizona in the cases cited, have applied this principal and have held that the *insured and those who claim under him* are found by his representations and that the Company had the right to rely on them and that knowledge as to the falsity of some of them does not invalidate the policy.” (Emphasis the court’s.)

It would seem to go without citing authority that the District Court is not justified in violating the due process clause of the Constitution notwithstanding that the District Court was apparently following the dictates of the Arizona Supreme Court in so doing.

CONCLUSION

It is respectfully submitted that the judgment in the above entitled action must be reversed.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN H. WESTOVER



APPENDIX A

§ 28-1170. "Motor vehicle liability policy" defined

A. A "motor vehicle liability policy" as the term is used in this chapter means an owner's or an operator's policy of liability insurance, certified as provided in § 28-1168 or § 28-1169 as proof of financial responsibility, and issued, except as otherwise provided in § 28-1169, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

B. The owner's policy of liability insurance must comply with the following requirements:

1. It shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted.

2. It shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle or motor vehicles within the United States or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle as follows:

- (a) Ten thousand dollars because of bodily injury to or death of one person in any one accident.

- (b) Subject to the limit for one person, twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident.

- (c) Five thousand dollars because of injury to or destruction of property of others in any one accident.

C. The operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages

arising out of the use by him of any motor vehicle not owned by him, within the same territorial limits and subject to the same limits of liability as set forth in subsection B of this section with respect to an owner's policy of liability insurance.

D. The motor vehicle liability policy shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged therefor, the policy period and the limits of liability, and shall contain an agreement or be endorsed that insurance is provided thereunder in accordance with the coverage defined in this chapter as respects bodily injury and death or property damage, or both, and is subject to all the provisions of this chapter.

E. The motor vehicle liability policy need not insure liability under any workmen's compensation law nor liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of the motor vehicle nor liability for damage to property owned by, rented to, in charge of, or transported by the insured.

F. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle liability policy occurs. The policy may not be cancelled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurrence of the injury or damage, and no statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy.

2. The satisfaction by the insured of a judgment for the injury or damage shall not be a condition precedent to the

right or duty of the insurance carrier to make payment on account of the injury or damage.

3. The insurance carrier shall have the right to settle any claim covered by the policy, and if the settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in paragraph 2 of subsection B of this section.

4. The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of the chapter shall constitute the entire contract between the parties.

G. A policy which grants the coverage required for a motor vehicle liability policy may also grant lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and the excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants the excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

H. A motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this chapter.

I. A motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance.

J. The requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet the requirements.

K. A binder issued pending the issuance of a motor vehicle liability policy shall be deemed to fulfill the requirements for such a policy. As amended Laws 1961, Ch. 94, § 4.

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MATTHEW DORR, deceased, et al,

Appellees.

Appellant's Reply Brief

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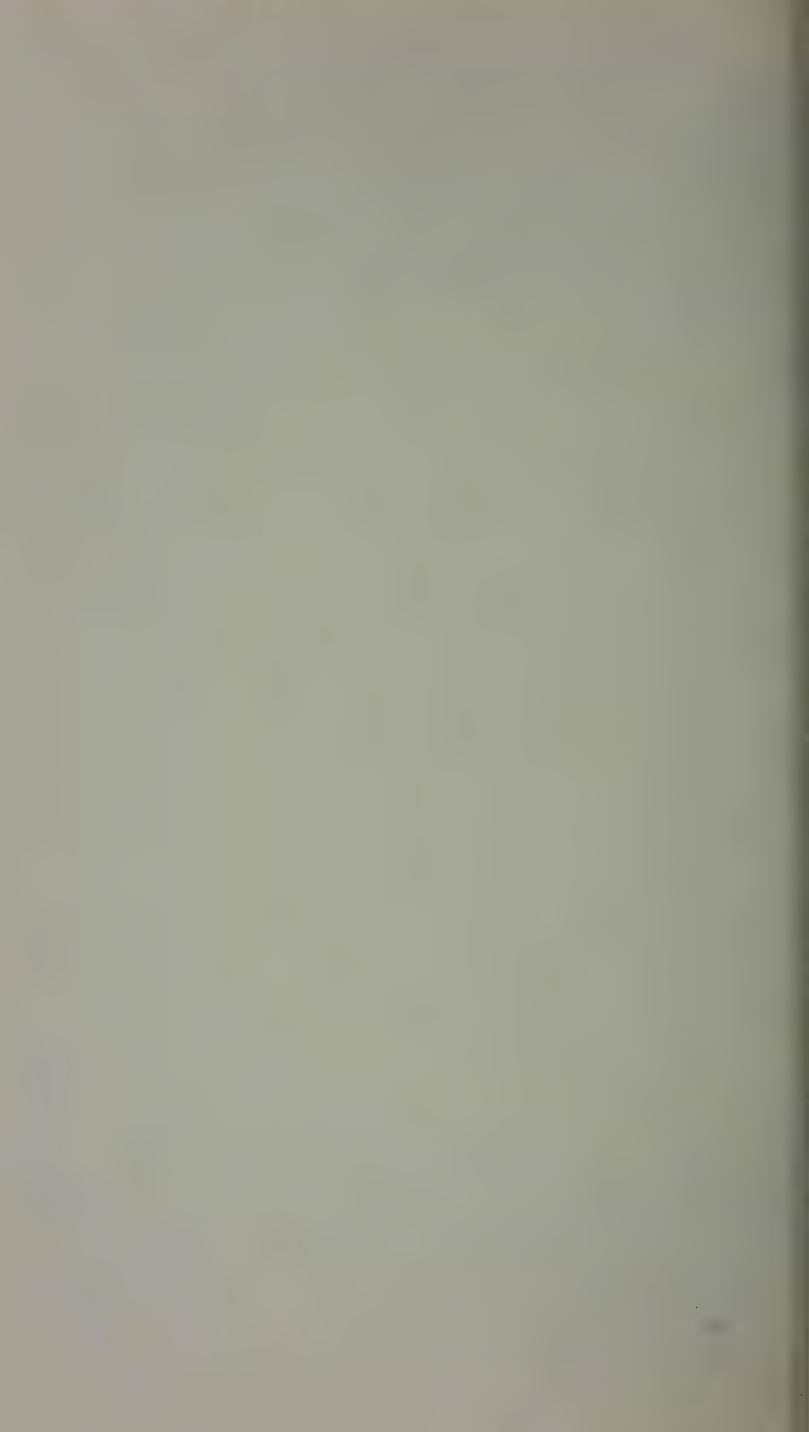
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Appellees.

Appellant's Reply Brief

Reply to Brief of Appellees Dorr

OUTLINE OF ARGUMENT

1. This appeal is not contrary to Appellant's announced position.
2. A substantive due process challenge to the Arizona Financial Responsibility Act, as here applied, has never been heretofore made.
3. State Court decisions are not binding on this court on Federal questions.
4. A legislative enactment may be constitutional in one application and unconstitutional in another application.

5. Imposing liability on Appellant on the claim of public policy—police power violates the equal protection clause of the 14th Amendment.

ARGUMENT

Appellees are *still* entitled to be paid by Allstate if *Sandoval v. Chenoweth*, 102 Ariz. 241, 428 P.2d 98 stands. This appeal is taken for the express purpose of striking down *Sandoval* as an unconstitutional application of the Financial Responsibility Act. Thus, Appellees' claim (made with much emotional fervor) that this appeal is contrary to the statement of the undersigned (Appellees' Brief, pp. 1-2) ignores the import of this appeal.

Sandoval v. Chenoweth, supra, applied the following portion of Section 28-1170 F., Arizona Revised Statutes, to a non-certified policy of automobile insurance:

“1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle liability policy occurs. The policy may not be cancelled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurrence of the injury or damage, and *no statement made by the insured* or on his behalf and no violation of the policy shall defeat or void the policy.’” (Emphasis added by author.)

This author does not now conceive, nor did he at oral argument before the District Court conceive of any way the Federal District Court Judge could follow the law as set down in *Sandoval* and find for Allstate. The point is, as Appellee's brief attempts to obfuscate, that *Sandoval* should not be followed because it is unconstitutional.

An oversimplified statement of Allstate's position on this appeal is as follows: (1) The right to contract is protected

by the U. S. 14th Amendment. (Appellant's Brief, pp. 7-8) (2) The right to contract includes the right to avoid contracts induced by fraud. (pp. 10-11) (3) Infringement of 14th Amendment rights is permitted in the exercise of the police power of the state but only if the action bears a "real and substantial relation to the end sought to be accomplished." (pp. 11-12) (4) *Sandoval v. Chenoweth*, supra, and the action of the District Court Judge herein, violate the 14th Amendment because requiring the insurance company to honor a contract void for fraud "is not a reasonable method of accomplishing the ends" sought to be accomplished by the Arizona Financial Responsibility Act. (pp. 6, 10, 12, 13)

Appellees Have Not Cited One Single Case to Justify the Constitutionality of the Financial Responsibility Act as Applied by *Sandoval v. Chenoweth*, Supra.

Appellees suggest that the question here presented has been raised in *Jenkins v. Mayflower Insurance Exchange*, 93 Ariz. 287, 380 P.2d 145; *Carpenter v. Superior Court*, 101 Ariz. 565, 422 P.2d 129; and *Sandoval v. Chenoweth*, supra. In fact such suggestion is wholly erroneous. *Jenkins v. Mayflower*, supra, did not consider the constitutionality of anything. *Carpenter v. Superior Court*, supra, said questions of constitutionality were raised by the lawyers, but the opinion never discussed it. (422 P.2d 136) And *Sandoval v. Chenoweth*, supra, discussed *only* procedural due process on the question of notice of the suit, and even then did not decide that question. (428 P.2d 102)

However, whether the State Supreme Court considered substantive due process or not is beside the point.

Where Federal questions are presented, whether involving the Constitution or not, the State Court decisions are

not binding upon the Federal Courts. *Sun Insurance Office, Limited v. Clay*, (USCA 5th) 319 F.2d 505 at 510; *Randel v. Beto*, (USCA 5th) 354 F.2d 496 at 500; *Nixon v. Condon*, 286 U.S. 73, 76 L ed 984 at 990.

The citation of *Sandoval v. Chenoweth*, *supra*, as establishing the constitutionality of the Financial Responsibility Act when the very issue here is whether the action of the Arizona Supreme Court in that case constituted an unconstitutional application of the statute is more than a little ludicrous.

A further point should here be noted. The Arizona Financial Responsibility Act was held constitutional by the Arizona Supreme Court in *Schechter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136. The challenge there was being made by a motorist who had lost driving privileges and by a vehicle owner who had forfeited the vehicle registration, under the provisions of the Act.

This author would concede that the Arizona Financial Responsibility Act was constitutional *as there applied*. However, a legislative enactment may be constitutional in one application and unconstitutional in another application. Such a proposition was announced by the United States Supreme Court in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 289, 42 S.Ct. 106, 66 L ed 239 at 243 in the following language:

“The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another.”

An argument which Appellees did not make, but which this author expected them to make (and since they did not,

will be made for them and answered), but which will occur to this Court, is as follows :

The public policy of *Schechter v. Killingsworth*, supra, is to protect persons injured in motor vehicle accidents against the possibility of an absence of compensation for injuries sustained; the further public policy is to avoid the necessity of the public (through the public welfare) supporting and caring for those who are injured on the highways; (this latter argument ignores the possibility of higher premiums paid by the public for insurance to cover such injuries); the conclusion to be drawn from such public policy argument is that: "It is better that the burden of injuries in this situation fall upon the insurance industry than upon the individuals injured."

We will concede that if properly, fairly and reasonably implemented, such a conclusion would be a legitimate statement of public purpose sufficient to invoke the police power to attain those ends.

But where such argument fails is because the means employed by *Sandoval* (as in the instant case) bears no relationship to the public policy argument.

If the insurance industry should bear the cost of damages done by uninsured motorists, and the state is to impose the financial responsibility therefor upon the insurance industry, then the state must apportion those losses between insurance companies in some reasonable manner and not impose the entire loss of an injury upon a company defrauded by a lying applicant!!!

The equal protection clause of the 14th Amendment requires the *Sandoval* method of apportioning uninsured losses be declared unconstitutional. In *Bilyeu v. State Employees' Retirement System*, 25 Cal.Rptr. 562 at 565, 375 P.2d 442, the Supreme Court of California said:

“There is no constitutional requirement of uniform treatment, but only that there be a reasonable basis for each classification.”

And a similar statement was made in *Garrett v. State*, Conn., 141 A.2d 249, as follows:

“. . . the equal protection of the laws does not prevent classification so long as it is reasonable, not arbitrary, and rests on a distinction having a fair and substantial relation to the object sought to be accomplished.”

It would seem clear that adventitious selection of those insurance companies who are to bear the loss on the basis of having received fraudulent applications cannot be said to have any reasonable relationship to the object sought to be accomplished. Such a haphazard classification surely cannot be said to be reasonable.

Under *Sandoval* the following hypothetical would exist. Companies A, B and C all receive applications on the same day that are wholly fraudulent. The applicant to A company has an accident the morning after the binder has been issued and before any investigation of the risk can be made. A company must therefore bear the entire loss caused by the applicant. The applicant to B company does not have an accident until after B company has acquired notice of the fraud and sent notice of cancellation. B company does not pay anything. The applicant to C company though equally fraudulent does not become involved in an accident. C company, although it never attempts to discover the fraud or to cancel the policy, is not required to pay anything to any person. D company also receives an application on the same day from an honest applicant and is therefore obligated to pay only that which it contracts to pay.

Such a distinction in obligation is not related in any way to the end sought to be accomplished.

If the state desires, it certainly may impose upon all insurance companies the obligation to care for those injured by uninsured motorists. And the state may apportion those losses among various insurance companies if done in accord with the equal protection of the laws provision of the 14th Amendment. But, constitutionally, this selection cannot be left to the applicant who falsely represents facts in his insurance application.

Reply to Brief of Lombardo and Badger Mutual

These parties who claim to be Appellees are interlopers on this appeal. The judgment from which the appeal was taken does not name or in any manner refer to these two parties, (Transcript of Record, page 60) nor did the Notice of Appeal in any way refer to these parties. (Transcript of Record, page 62) It would seem that the brief filed by these parties should be stricken. However, whether it is or not is of no matter since nothing contained in that brief remotely bears upon the constitutional issue here presented.

CONCLUSION

It is respectfully submitted that to prevent all insurance companies writing automobile insurance policies in Arizona from avoiding contracts induced by the fraud of the applicants is not a reasonable method by which to attain the ends of the Arizona Financial Responsibility Act. It is thus further submitted that the decision of the Honorable District Court Judge should be reversed and the court should declare that *Sandoval v. Chenoweth*, supra, to the extent

that it compelled the finding by the lower court, is in violation of the 14th Amendment to the United States Constitution.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN H. WESTOVER

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W. B. LUCK

BRIEF OF APPELLEES
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 Appellees.)

BRIEF OF APPELLEES
LUCIO M. LOMBARDO
and
BADGER MUTUAL INSURANCE COMPANY

Appellant's brief confuses substantive and procedural due process. Procedural due process relates to "notice and an opportunity to be heard and to defend in an orderly proceeding,"* while substantive due

*Quotation from Phoenix Metals Corp. v. Roth, 79 Ariz. 106, 284 P.2d 645, as quoted in Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98.

process

"is interpreted to mean that the state is without right to deprive a person of life, liberty or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental powers. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436. As applied to legislative enactments, due process of law means only that statutes shall be general in operation and affect the rights of all who should properly be brought within their provisions. Barrington v. Barrington, 206 Ala. 192, 89 So. 512, 17 A.L.R. 789."*

The Arizona Supreme Court in Farmer v. Killingsworth, 102 Ariz. 44, 424 P.2d 172, in a highly analagous situation, has determined that § 28-1142, A.R.S. 1956, of the Arizona Financial Responsibility Act was not a violation of substantive due process because the legislation was not an unconstitutional discrimination between members of a class. Farmer said that

"the primary purpose of the Financial Responsibility Act is to prevent financial distress to persons involved in accidents on the highways

*Valley Nat'l Bank v. Glover, 62 Ariz. 538, 159 P.2d 292, 298-99.

with uninsured motorists. Schechter v. Killingsworth, 92 Ariz. 273, 380 P.2d 136 (1963). We stated in the same case that '* * * the social objective of preventing financial hardship and possible reliance upon the welfare agencies of the state is a permissible goal of police power action'. 93 Ariz. at p. 281, 380 P.2d at p. 141." 424 P.2d at 175.

Two recent Arizona cases have interpreted procedural due process as it applies to the statute in question, § 28-1170, A.R.S. 1956, to wit, Carpenter v. Superior Court, 101 Ariz. 565, 422 P.2d 129, and Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98. In Carpenter the aggrieved insurance company, referred to as Zurich, contended that the judgment against it was in violation of due process because it

"received no notice of the application for default judgment, and therefore '[n]o notice or opportunity to be heard on the question of liability or damages was given to Zurich.* * *'" 422 P.2d at 135.

The Court disposed of this procedural due process argument by stating in essence that (1) Zurich acted at its peril in withdrawing its attorneys as counsel; (2) Phoenix Metals Corp. v. Roth, supra,* is not on

*Relied upon by appellant herein.

point because

"Zurich is not 'the party against whom judgment by default is sought' as was the defendant in the Roth case." 422 P.2d at 136.

In Sandoval, the same attorneys as represent appellant herein contended that the appellant insurance company, called Financial, had been denied due process. In spite of the fact that Financial, like Zurich in Carpenter, was not the party against whom judgment by default* was sought, the Arizona Supreme Court did discuss whether or not procedural due process had been satisfied. Sandoval stated that Phoenix Metals Corp. v. Roth, supra, set forth the elements of due process in regard to notice and in part quoted the same portion of Roth that is quoted in page one of this brief. Financial's counsel first learned of the default judgment on May 29, 1961, but did not file a motion to set aside the default until August 9, 1961, more than nine weeks later. The Arizona Supreme Court pointed out that the trial court could have found that the motion

*Default was against Financial's assured who apparently did not notify Financial of the complaint until after default and default judgment.

to set aside the default judgment was not made within a reasonable time, consequently the Supreme Court could not say that the trial court "abused its discretion in failing to grant the motion." The issue was concluded by the following statement:

"In light of the foregoing facts, Financial has not been deprived of its constitutional right of due process of law, as the Financial Responsibility Law was in effect at the time of the issuance of this policy, and its counterpart in California had been interpreted in accord with our subsequent decision in *Mayflower. Wildman v. Government Employees Ins. Co.*, supra." 428 P.2d at 102-03.

The above quoted statements mean that there was no denial of procedural due process; in addition, substantive due process was disposed of since the Arizona Financial Responsibility Law (as in this case) was in effect at the time of the issuance of the policy.

The due process aspect of Carpenter and Sandoval was procedural, although the above quotation from Sandoval did make an apparent oblique comment as to substantive due process. The above analyzation of these cases shows that such reliance by appellant upon these cases is not justified. There is no issue herein as to notice or an opportunity to be heard. Rather, the

thrust of appellant's argument is substantive due process.* The issue of substantive due process is disposed of by Farmer v. Killingsworth, supra, and public policy statements of the Arizona Supreme Court in Jenkins v. Mayflower Ins. Exch., 93 Ariz. 287, 380 P.2d 145, and Dairyland Mut. Ins. Co. v. Andersen, 102 Ariz. 515, 433 P.2d 963.**

Respectfully submitted,

McKESSON, RENAUD, COOK, MILLER & CORDOVA

By

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Attorneys for Appellees Lombardo and

Badger Mutual Insurance Company

*Appellant argues "due process when applied to substantive rights," p. 7, Appellant's Opening Brief, that a regulation must be reasonably necessary to secure the general welfare of the community, p. 7, Appellant's Opening Brief, that due process requires reasonable exercise of police power, p. 8, Appellant's Opening Brief, that the Fourteenth Amendment, due process, includes the right to freely contract without unreasonable restraint, p. 10, Appellant's Opening Brief.

**The Arizona Supreme Court said as follows in Dairyland as to the public policy of the Sandoval and subsequent judicial interpretations of § 28-1170, A.R.S. 1956: "It is neither desirable nor advisable to engraft exceptions upon statutory pronouncement now so firmly recognized as the public policy of this jurisdiction." 433 P.2d at 965. Sandoval and Dairyland were again affirmed on May 8, 1968 by the Arizona Supreme Court in the yet unreported decision of Harleysville Mut. Ins. Co. v. Clayton, No. 8607.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Gordon Cook

RECEIVED
MAY 1 1968
U.S. COURT OF APPEALS
NINTH CIRCUIT

No. 22443

In the

United States Court of Appeals

For the Ninth Circuit

ALLSTATE INSURANCE COMPANY, an Illinois
corporation,

Appellant,

vs.

NELSON CHRISTIAN DORR and AEDA DORR,
his wife, surviving parents of FELIX
MATTHEW DORR, deceased, et al.,

Appellees.

Brief of Appellees

Nelson Christian Dorr and Aeda Dorr

FILED

MAY 1 1968

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No. 22443

In the

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ALLSTATE INSURANCE COMPANY, an Illinois
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Appellant,

vs.

NELSON CHRISTIAN DORR and AEDA DORR,
his wife, surviving parents of FELIX
MATTHEW DORR, deceased, et al.,

Appellees.

Brief of Appellees

Nelson Christian Dorr and Aeda Dorr

JURISDICTION

Jurisdiction is conceded.

STATEMENT OF THE CASE

Inaccurate and contested, but conceded for purposes of
this argument only.

ARGUMENT OF THE CASE

1. The Appellant is barred and precluded from this
appeal by virtue of an express stipulation made in open

court. See Reporter's Transcript of Proceedings, dated June 12, 1967, at Pages 4, 6, 7 and 10. Counsel of Appellant stated during the hearing of Appellees Dorr's Motion for Summary Judgment, at Page 10, Line 20 through 24:

"Mr. Rosengren is entitled to be paid by Allstate if Chenoweth versus Sandoval stands as it is now written.

"So we are not talking about delaying Mr. Rosengren's rights if Chenoweth stands, because we will pay him immediately."

The Rehearing of *Sandoval v. Chenoweth*, 102 Ariz. 241, 428 P.2d 98, was denied on July 6, 1967.

2. The constitutionality of the Financial Responsibility Law of Arizona has been upheld in a number of cases, and artful distinctions between "motor vehicle liability policy," "certified policy," etc., or other artful terms or distinctions cannot defeat the purpose of the Act.

3. The purpose and import of the "entire automobile financial responsibility law is liberally construed to foster its main objective of giving 'monetary protection to that ever changing and tragically large group of persons who while lawfully using the highways themselves suffer grave injury through the negligent use of those highways by others.'" *Sandoval v. Chenoweth*, supra, at page 244.

4. In the Reporter's Transcript of Proceedings dated June 12, 1967, counsel for Appellant conceded its obligation to pay the judgment and agreed to pay the judgment forthwith upon denial of the Rehearing in *Sandoval v. Chenoweth*, supra. That stipulation has been breached and the Appellant has reneged on a solemn obligation and commitment made in open court. Such conduct is reprehensible, should not be tolerated, and the Appellees Dorr should have judgment forthwith and punitive sanctions should be taken by this court against the Appellant.

5. *Jenkins v. Mayflower Insurance Exchange*, 93 Ariz. 287, 290, 291, 380 P.2d 145 (1963), makes the omnibus clause prescribed in the Financial Responsibility Act of Arizona as a part of every motor vehicle liability policy in passing upon the constitutionality of the Financial Responsibility Law, and the Court said therein:

“Where the basis upon which this act has been declared constitutional is, ‘preventing financial hardship and possible reliance upon the welfare agencies,’ we cannot constitutionally allow artful distinctions between ‘motor vehicle liability policy,’ ‘automobile liability policy’ or ‘policy of insurance’ to defeat the purpose of the act. To do so would make our opinion in *Schechter v. Killingsworth*, *supra*, a sham.”

6. The constitutionality of the Act was likewise challenged in *Carpenter v. Superior Court in and For Maricopa County*, 101 Ariz. 565, 422 P.2d 129 (1967), and it was more recently challenged in *Sandoval v. Chenoweth*, *supra*, at page 244, wherein the Court said:

“In the absence of any showing of injustice or a legislative change of public policy, we find no reason to depart from the established law of the state and the doctrine of stare decisis. The social and economic problems arising from the ever mounting casualty rate on our streets and highways are even more persuasive today than at the time of the enactment of the financial responsibility law or the decision in *Mayflower*.”

The Court also in *Sandoval v. Chenoweth*, *supra*, at page 244, reaffirmed its holding in *Jenkins v. Mayflower Insurance Exchange*, *supra*, and said:

“Under the rule expressed in *Mayflower*, the provisions of the Financial Responsibility Law are applicable to the facts of the instant case whether or not the policy would be technically classed as a ‘certified’ policy. A.R.S. § 28-1170 expressly states as follows:

‘F. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

‘1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle liability policy occurs. The policy may not be canceled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurrence of the injury or damage, and no statement made by the insured or on his behalf *and no violation of the policy shall defeat or void the policy.*’ [Emphasis Added.]

“In the light of the Mayflower decision, the foregoing statutory provision is controlling in the instant case.”

7. Since Arizona law treats all of these policies the same, the following quotation from 83 A.L.R.2d 1104 is controlling as the law of the case, wherein the annotator sums up the cases as follows:

“It has been universally held or recognized that an insurer issuing an automobile liability policy pursuant to any of the various statutory plans designed to protect the public against the inability to collect damages in tort from financially irresponsible owners or operators of motor vehicles, cannot escape liability to a third party injured through the culpable operation of the vehicle insured, during and within the coverage afforded, because of any fraud or misrepresentations relating to the inception of the policy which might have afforded the insurer a cause for rescinding, reforming, canceling ab initio, or otherwise avoiding an ordinary, voluntary liability policy, so as to escape such liability.”

8. The Appellant cites in its Opening Brief the case *State Farm Mutual v. Butler*, (Va.) 125 S.E.2d 823, but

Virginia makes a distinction between “certified” and “non-certified” policies, and this distinction is clearly pointed out in the case of *Virginia Farm Bureau Mutual Insurance Company v. Saccio*, 204 Va. 769, 133 S.E.2d 268 (1963), which clearly makes the difference in fixing absolute liability, as was stated by the Court at page 276:

“As has been previously noted, the legislature has clearly expressed such an intention with respect to certified policies issued pursuant to the Safety Responsibility Act. If, following certification of a policy issued under the Act, loss or damage covered thereby occurs, the liability of the carrier to the insured is absolute.”

9. The current attitude of the Supreme Court of Arizona and the current posture of the law as regards the constitutionality of the Arizona Financial Responsibility Act is reflected in an opinion filed May 8, 1968, in the case entitled:

“Harleysville Mutual Insurance Co., a corporation,
Appellant,
v.

Franklin Stanley Clayton and Irene E. Clayton, his wife; and Henry Espinoza and Catherine Espinoza, his wife; Noel Thomas, individually and Noel Thomas, as Guardian ad Litem for Willis Thomas and Karen Thomas, minors; and Patricia E. Thomas, his wife,

Appellees.

and for the Court’s convenience is attached herein as Appendix A.

CONCLUSION

1. The appeal is frivolous and barred because of the breached stipulation, and punitive sanctions against the Appellant should be invoked.

2. The appeal is without merit on the law, and the judgment of the District Court should be upheld.

Respectfully submitted,

KENNETH ROSENGREN

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Phoenix, Arizona 85003

Attorney for Appellees

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KENNETH ROSENGREN

(Appendix A Follows)

Appendix A

In the Supreme Court of the State of Arizona

In Division

No. 8607

Harleysville Mutual Insurance Co., a corporation,

Appellant,

vs.

Franklin Stanley Clayton and Irene E. Clayton, his wife, and Henry Espinoza and Catherine Espinoza, his wife; Noel Thomas, individually and Noel Thomas, as Guardian ad Litem for Willis Thomas, and Karen Thomas, minors; and Patricia E. Thomas, his wife,

Appellees.

Appeal from the Superior Court of Maricopa County

Honorable Charles C. Stidham, Judge

AFFIRMED

Filed May 8, 1968

TREW & WOODFORD

by R. R. Woodford—Phoenix

Attorneys for Appellant

James E. Grant—Phoenix

Attorney for Appellees Clayton

Gordon G. Aldrich—Phoenix

Attorney for Appellees Thomas

McFarland, Chief Justice:

Noel and Patricia Thomas filed suit in the Superior Court of Maricopa County for personal injuries sustained in an

automobile accident caused by a car owned by Irene Clayton, driven by her husband Franklin Clayton, and insured by plaintiff-appellant Harleysville Mutual Insurance Company, hereinafter called the company. While that suit was pending the company brought an action for declaratory judgment against the Claytons and the Thomases, and others not involved in this appeal.

The basis of this action was the fact that the company's liability policy on the Clayton car contained an endorsement providing that coverage would not apply when the vehicle was being driven by Franklin Clayton. After the issues were joined, the Thomases moved for a summary judgment declaring the company answerable under its policy. The trial court ordered that the company "be denied all relief and that the action be dismissed on its merits." The case now before us is an appeal by the insurance company from that order.

In *Jenkins v. Mayflower Insurance Exchange*, 93 Ariz. 287, 380 P.2d 145, after quoting from *Schechter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136, we said:

"Where the basis upon which this act has been declared constitutional is, 'preventing financial hardship and possible reliance upon the welfare agencies,' we cannot constitutionally allow artful distinctions between 'motor vehicle liability policy,' 'automobile liability policy' or 'policy of insurance' to defeat the purpose of the act. To do so would make our opinion in *Schechter v. Killingsworth*, *supra*, a sham.

"We hold, therefore, that the omnibus clause is a part of every motor vehicle liability policy, by whatever name it may be called."

The company, while agreeing with *Jenkins v. Mayflower Insurance Exchange*, *supra*, contends it is not applicable to

the instant case, because in *Mayflower* the policy excluded all members of the armed services, while in the instant case the policy excluded only the car-owner's husband. Excluding a large group, says counsel, was completely unreasonable; excluding the husband, who was a known bad driver, on the other hand, was completely reasonable.

This argument—which is the only one advanced by the company—has already been decided by us in *Dairyland Mutual Insurance Company v. Andersen*, 102 Ariz. 515, 433 P.2d 963. In that case the automobile was owned by the O. K. Meat Packing Company, and the policy excluded only one man—James Andersen. In our opinion we said:

“Great Basin points to a written endorsement to its policy which provides that its insurance does ‘not apply with respect to any claim arising from accidents which occur while any automobile is being operated by’ Andersen. From this, Great Basin concludes that it has specifically excluded coverage of any accident occurring while Andersen was driving the Lincoln automobile and, therefore, there is no liability under its policy. Dairyland replies that Great Basin’s exclusion of Andersen is illegal and void under our holding in *Jenkins v. Mayflower*, 93 Ariz. 287, 380 P.2d 145, and this is correct. In *Mayflower*, we held that the statutory omnibus clause is a part of every motor vehicle liability policy. Great Basin asks us to overrule that case. We were asked to do so in the recent case of *Sandoval v. Chenoweth*, 102 Ariz. 241, 428 P.2d 98, and we refused. For the reasons stated there, we decline to consider the *Mayflower* holding further.

“Great Basin argues that even though we do not overrule *Mayflower* we should not apply it to this case because (a) *Mayflower* was a case where a whole class was excluded (all members of the armed forces); and (b) in this case the Dairyland policy is in existence and

the public is thus protected against Andersen being uninsured. We reject these arguments. It is neither desirable nor advisable to engraft exceptions upon the statutory pronouncements now so firmly recognized as the public policy of this jurisdiction. The rider excluding Andersen, being in derogation of the omnibus clause, is void."

Because of the soundness of both Mayflower and Dairyland, it follows that the judgment from which this appeal was taken must be affirmed.

Judgment affirmed.

Ernest W. McFarland, Chief Justice

CONCURRING:

Jesse A. Udall, Vice Chief Justice

Fred C. Struckmeyer, Jr., Justice

